Custom Bent Glass Company, Custom Glass Corporation, Saxonburg Industries, and Custom Resources Company *and* Aluminum, Brick and Glass Workers International Union, AFL–CIO–CLC. Cases 6–CA–21537–1 through 6

August 27, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On January 12, 1990, Administrative Law Judge Walter H. Maloney issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party also filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions[4] and to adopt the recommended Order as modified.[5]

1. We agree with the judge's finding that, by January 12, 1989, the Union had obtained authorization cards executed by 27 of the Respondent's employees who were members of the production and maintenance unit. In agreeing that this represented a card majority in that unit, we find that the unit consists of 53 employees, including 6 persons whom the judge had found should not be included.[6] As explained below, we reverse the judge's findings that Scott Geibel, Thomas Higgins, and Alfred M. Ferrari were supervisors, that Greg Rearick and John Whitehair had abandoned their employment with the Respondent following their December 30, 1988 layoff, and that Donald Freeman, who was drawing workmen's compensation, was not in the unit because he had no reasonable expectation that he would return to work in the near future.

Regarding the above individuals whom the judge found were excluded as supervisors, the testimony of Geibel, Higgins, and Ferrari establishes that they are classified as group leaders,[7] and have no authority to hire, fire, schedule, reward, discipline or evaluate employees and that they spend at least 95 percent of their time doing bargaining unit work. The testimony of

[1] No exceptions were taken to the following: the judge's inclusion of Ron George in the unit; his exclusion of Fred Pagliari from the unit; his express dismissal of the allegation that Pagliari's discharge was unlawful and the allegation that the Respondent unlawfully promised pay raises in return for support; and his implicit dismissal of complaint allegations that the Respondent violated Sec. 8(a)(1) by stating that the union does not care about the workers and only cares about collecting dues, and that there are ways of getting rid of employees without getting into trouble, and by reminding employees of its warning against union activity given during job interviews.

[2] In affirming the judge's granting of the General Counsel's motion to amend the complaint to include Custom Resources as a named Respondent, we find no merit in the Respondent's exception that Custom Resources had inadequate notice of this amendment because it was not named in the complaint prior to the hearing and was not served with any of the charges or the complaint. In view of the fact that Custom Resources is an unincorporated sole proprietorship of Thomas Rice, who was present at the hearing when the motion to amend was made, we find that it is clear that Custom Resources, through Rice, had actual notice. See *Certified Building Products v. NLRB*, 528 F.2d 968 (9th Cir. 1976), enfg. 208 NLRB 515 (1974). In that case the sole stockholder of a corporation was found to be the alter ego of his corporation. Service on the corporation was found to be the same as service on him. Furthermore, Custom Resources was not prejudiced by the timing of this notice. When the motion was made, the judge stated that he would take it under advisement and rule on it in his decision. This provided the Respondent and Custom Resources adequate time within which to prepare a defense and perfect their arguments; they made no request for additional time. Therefore, we affirm the judge's ruling.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findigs.

In affirming certain of the judge's conclusions, we disavow as unnecessary to the resolution of the respective issues certain findings made by the judge. Specifically, we place no reliance on his statement in fn. 10 of his decision that the Respondent committed ''more than the average amount of perjury.'' Further, because we sustain the judge's finding that Samosky is a supervisor, and his recommendation that Samosky be excluded from the appropriate bar gaining unit on that ground, we find it unnecessary to pass on whether Samosky's participation in the Respondent's antiunion campaign created a conflict of interest between him and unit employees.

We correct some inadvertent errors of the judge that do not affect the validity of his decision. Fn. 1 of the judge's decision should state that the first additional charge was filed January 18, not January 12, 1989. In his decision, the judge misidentified Virgil Cousins as Gerald Cousins. In the section on James A. Wright's discharge, the decision should state at Wright, not Bowser, made the statement that the Union would ''get'' employees who refused to sign cards. The section on Charles Colton's discharge should read that Colton, not Rice, was laid off on January 20. Finally, in the section of the judge's decision on the Union's majority status, the subsection on Tim Singer's inclusion in the unit misidentifies him in one instance as Timmy Rice.

[4] We find it unnecessary to pass on the judge's finding that the Respondent's observation of Union Respresentative Shinn's passing out union literature at the Kittanning plant gate constituted unlawful surveillance, because such a finding would be cumulative.

[5] The judge's recommended Order and notice are modified to conform to the findings of unfair labor practices.

[6] Member Cracraft, concurring, finds the record insufficient to establish the Union's majority status prior to January 23, 1989, which accordingly is the date she would attach to the Board's remedial bargaining order. Although she agrees with our conclusion that former employees Jonathan Sheehan and Randy Shields had abandoned their employment shortly after they were laid off, she would date the abandonment no earlier than January 23, in disagreement with the judge's finding that abandonment had occurred by January 12. Although we agree with our colleague's observation that Sheehan's and Shields' failure to inquire about recall by the end of the maximum projected period of layoff further evidences their abandonment of employment, we find that the record establishes abandonment by the earlier date. As the judge found, both employees had been laid off on December 30, 1988, after working for the Respondent for less than a month as general laborers. During that time they lived in a rented room. Rice stated that there was an attempt to contact them at the end of January, but they had moved and had not left any forwarding address. There is no indication that their departure occurred in the latter, as opposed to the earlier, part of January. Rice testified that he thought they had returned to West Virginia, that he did not know how to get in touch with them, and that there was no attempt to get in touch on their part. In light of these facts, we conclude that in all probability they abandoned their employment shortly after being laid off on December 30, if not on that date, and certainly before January 12. We find that the record warrants the inference that their attachment to his geographic locality and employment with the Respondent was transient and did not long survive their being placed on layoff status.

[7] There is no basis for the judge's conclusion that the term ''group leader'' was coined by the Respondent for the purposes of this proceeding. The record shows that the term predated this proceeding and that the Respondent has not sought to exclude employees from the unit on the basis of their status as a group leader. On the contrary, many of the Respondent's 18 group leaders were stipulated to be included in the unit.

Geibel and Higgins indicates that they have no authority to grant employees time off, and Ferrari, who leads a crew of up to three employees in the Renfrew plant on the 11 p.m. to 7 a.m. shift, testified that only in an emergency would he allow employees to go home without first checking with Rice or Plant Manager Cotton. Ferrari further testified that he would generally call Rice or Cotton if his crew had an employee leave early in order to see if it was necessary to attempt to call in a replacement; he would act alone only if he were unable to contact Rice or Cotton. There is no evidence that he had the authority to require employees to work outside of their scheduled hours. Geibel, who in January 1989 worked on a shift which started at 7 a.m. in the Renfrew plant, testified that if a scheduled employee did not come to work he would call Rice or Cotton before calling another employee to come in to work. We find that to the extent that these three persons had any involvement in employees' leaving work early or being called in outside of their scheduled hours, their close communication with Rice or Cotton in these matters precludes a finding that they exercised supervisory responsibility in this regard. The remaining distinctive aspects of their employment with Respondent, i.e., their greater seniority, higher pay, job title, and color of work clothes provide no cognizable indicia of supervisory authority. That these persons may work at times when no one with greater authority is present in the plant is inadequate to show supervisory authority; admitted supervisors were available by telephone. We therefore include these three employees in the unit.

We find, contrary to the judge, that employees Greg Rearick and John Whitehair did not abandon their employment with the Respondent following their layoff on December 30, 1988, and that, as temporarily laid-off employees, they had, on the determinative date of January 12, 1989, a reasonable expectancy of recall and should be included in the unit.[8] Rearick apparently did not work from the time of his layoff by the Respondent until he returned to work there in July 1989. Although the evidence indicates that he moved from his residence on February 6, 1989, and discontinued his telephone service, this occurred several weeks after the determinative date for considering his inclusion in the unit and was not the basis for the judge's exclusion of Rearick from the unit. The judge excluded Rearick from the unit as a constructive quit because during this period of unemployment he regained the custody of his children and elected to spend time at home with them. In the absence of any affirmative indication that Rearick would not have returned to work if recalled by the Respondent, we find no support for the judge's conclusion that his interest in his children precluded any interest on Rearick's part in returning to work with the Respondent.

As to the issue of Whitehair's abandonment of employment with the Respondent, the sole evidence relied on by the judge in excluding Whitehair from the unit on this basis is his acceptance of alternative employment in the geographic vicinity while on layoff from the Respondent. During this time, and until his return to employment with the Respondent in the summer of 1989, he maintained the same post office box address that he had while earlier employed by the Respondent. We find that Whitehair's apparently greater interest in gainful employment during this period is likewise an insufficient reason to exclude him from the unit on the ground of abandonment of employment with the Respondent. We shall include both of these employees in the unit.

Finally, we find that Donald Freeman should be included in the unit. As of January 12, 1989, he was still suffering from a work injury incurred on August 5, 1988, and was drawing workmen's compensation, and had neither resigned nor been discharged. An employee on sick leave is presumed to be part of the unit absent evidence that the employee has been terminated or has resigned. See *Red Arrow Freight Lines*, 278 NLRB 965 (1986).[9]

2. We affirm the judge's finding that the inclusion of John Baker in the Respondent's layoff of employees on December 30, 1988, constituted a violation of Section 8(a)(3) and (1), but in doing so we disavow his gratuitious comment that Respondent is ''not a respondent which deserves the benefit of any doubt.'' Instead we rely on the following rationale.

In dealing with the alleged unlawful discharge of an employee, we first consider whether the General Counsel has made out a prima facie case supporting the inference that union animus was a motivating factor in the action that was taken.[10] We find that such a prima facie case was made with respect to Baker's selection for layoff. Although the General Counsel has not contested the Respondent's need to lay off some employees on December 30, he specifically has contested the lawfulness of Baker's inclusion in the layoff. The Respondent's modus operandi at that time was one of using unfair labor practices to discourage unionization.

[8] In finding that these two employees had abandoned their employment, the judge found it unnecessary to resolve whether they otherwise would have had a reasonable expectancy of recall. In view of the fact that they were informed that the layoff was ''short term'' and was premised on a decline in orders, and that they would be given ''top consideration'' for recall, we find that in the absence of any further contrary information, these employees, on January 12, 1989, had a reasonable expectation of recall in the near future.

[9] Chairman Stephens did not participate in the Board's decision in *Red Arrow Freight*, but for institutional reasons accepts it as the controlling precedent in assessing Freeman's inclusion in the unit.

In agreeing that Freeman should be included in the unit, Member Devaney finds it clear on the facts that Freeman retained his employee status as of determinative date and, accordingly, that Freeman is included in the unit under either of the views expressed in *Red Arrows Freight.*

[10] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Long before the Union's campaign be both outside and within the 10(b) period and prior to the December 30, 1988 layoff, the Respondent had interrogated prospective employees about their union sympathies and threatened them with discharge if they engaged in union activity. It had accused one employee (Myers) in August 1988 of organizing a union, created the impression that his union activities were under surveillance, and threatened to discharge him or anyone else for talking union. Thus, in mid-December 1988, when the Union began its organizing campaign, the Respondent's unlawful response was not only predictable but, as events unfolded, openly manifested. Given this evidence of antiunion activity, we find that the timing of Baker's layoff, 1 day after his execution of an authorization card and after he had collected several cards for the Union, was not mere coincidence. Rather, we infer from the totality of the circumstances—including the Respondent's failure to explain why Baker was chosen for layoff[11]—that the Respondent learned about Baker's union activism before the December 30 layoff, and that, in keeping with its virulent antiunion stance, chose to include him in it to rid itself of an active union adherent and solicitor.

Once a prima facie case is established, the Respondent is required to show that the same action would have taken place even absent the protected conduct. We find that the Respondent has presented no evidence to legitimize Baker's inclusion in this December 30 layoff. Rather, the Respondent's evidence is limited to an attempt to establish why Baker was not recalled in early January, although less senior employees who had been laid off with Baker were recalled at that time. The Respondent contends that these less senior employees were recalled before Baker because the Respondent's participation Government programs that subsidized certain employees made the less senior employees cost nothing. Had Baker's status as a laid-off employee first been established as legitimate, this evidence may well have been relevant to a ''failure to recall'' allegation, but in the present posture it is irrelevant to the legitimacy of his original layoff (and also to the extent of the Respondent's backpay obliations concerning Baker).[12] In any event, the Respondent has never explained why the more senior and presumably more experienced Baker was laid off with the less senior employees, regardless any evidence in support of their recall. For the reasons stated above, we that Baker's layoff violated Section 8(a)(3) and (1).

3. The judge found, and we agree, that the Union had obtained signed authorization cards from a majority of the Respondent's employees and that a bargaining order is therefore warranted to remedy the Respondent's extensive and pervasive unfair labor practices in violation of Section 8(a)(3) and (1) of the Act. Thus, the judge properly relied on the Respondent's chief operating officer's direct involvement in these violations, including the discharge or layoff of seven employees and its repeated independent violations of Section 8(a)(1), including its admission that it had fired employees involved in union organizing and its threats to discharge other employees whom it found were also so involved, and its veiled and explicit references to plant closure or limited production as a result of the employees' union activity.[13] This case is stronger than *Frito-Lay v. NLRB*, 585 F.2d 62 (3d Cir. 1978), in which the court found a bargaining order warranted, notwithstanding its refusal to uphold the Board's finding that the closing of the plant was unlawful. In that case, as in the one at hand, there were threats of discharge, the creation of the impression of surveillance, and threats to close the plant as a result of the employees' union activity. Therefore, we find, as did the administrative law judge, that in light of the flagrant unfair labor practices of the Respondent there is little likelihood that the employees could have exercised free choice in an election. Accordingly, the Respondent violated Section 8(a)(5) and (1) by refusing the Union's demand for recognition. We shall date this

[11] See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Of the eight employees laid off on December 30, Baker and Dean Crawford were the only two to have signed a union card. Dean Crawford's card had no date other than the date stamp of January 13, affixed to it by the Board's Regional Office. He did, however, testify that he signed his card in December. Unlike Baker, there is no evidence Crawford engaged in any other union activity prior to the December 30 layoff.

[12] Even if this were relevant, the Respondent has not explained how the subsidy program would have motivated it to recall the less senior workers at that particular time, rather than adhering to the Respondent's normal practice of following seniority. The evidence indicates that employees hired under the Government subsidy programs were granted subsidies for specific number of workdays, and that the number of remaining workdays for which they were entitled to receive a subsidy was unaffected either by their layoff or by the duration of the layoff. To the extent that the Respondent may be attempting to suggest that its failure quickly to recall these subsidized employees may have jeopardized these employees' interest in further employment with the Respondent (and the Respondent's ability to obtain all the benefits under a full subsidy), it has failed to explain why any such apprehension would not have prevented it from laying off such subsidized employees in the first place. Although at the hearing, it was alleged that there was a shortage of work for which the subsidized employees and experience, the Respondent has not claimed that there was no work which they could have performed at the time of their layoff.

[13] That six of the seven discharged or laid-off employees were rehired either in February or in March does not dissipate the impact of their unlawful discharge or layoff either on them or on their fellow employees. By then, the Respondent's point had been indelibly made: the Respondent was willing to resort to the extreme measure of termination for those employees who supported the Union, in order to keep the Union out. As stated by the Board in *Quality Aluminum Products*, 278 NLRB 338 at 339 (1986), enfd. 813 F.2d 795 (6th Cir. 1987), cert. denied 484 U.S. 825 (1987): ''It is reasonable to assume that the four [reinstated] employees, once having been laid off for their union activities, would be 'painfully aware that future support of a union could lead to the same end (footnote omitted),''' See also *Martin City Ready Mix*, 264 NLRB 450 (1982), and cases cited therein. We also note that the Respondent engaged in further unfair labor practices, after the reinstatements, such as as king discriminatee Six in his reinstatement interview if he was the one who initiated contact with the Union and, as late as June 1989, asking employee Claypole if he had signed a union card. See, e.g., *Well-Bred Loaf, Inc*., 280 NLRB 306 (1986).

violation and the bargaining order from January 13, 1989.[14]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Custom Bent Glass Company, Custom Glass Corporation, Saxonburg Industries, and Custom Resources Company, Kittanning and Renfrew, Pennsylvania, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

''(a) Offer to Steven Six, Gary Bowser, Virgil K. Cousins, James A. Wright, John McKinney, John Baker, and Charles Colton immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decisio if they have not already done so.''

2. Add the following as paragraph 2(b) and reletter the following paragraphs.

''(b) Remove from its files any re ference to the unlawful discharges layoffs and notify the employees in writing that this has been done and that the discharges and layoffs will not be used against them in any way.''

3. Substitute the attached notice for that of the administrative law judge.

MEMBER CRACRAFT, concurring.

I agree with my colleagues' findings regarding the numerous violation of Section 8(a)(1) and (3). I also agree that an 8(a)(5) *Gissel*[1] bargaining order is warranted. I do not, however, agree that the Union's majority status was established as of January 12, 1989, the date of the Union's bargaining demand, because I believe that the evidence fails to show that laid-off employees Sheenan and Shields had abandoned their employment as of that date.[2] For the reasons set forth below, I would, however, find that the record establishes that Sheenan and Shields had abandoned their employment at least as of January 23, 1989. Accordingly, I would date the *Gissel* bargaining obligation as arising as of that day.[3]

Sheenan and Shields were laid off on December 30, 1988. As my colleagues find in their discussion of the layoff of Rearick and Whitehair, who were also laid off on December 30, the laid-off employees had a reasonable expectancy of recall in the near future. The layoff letters, set out in full in the judge's decision, advised that the Respondent was announcing a short-term layoff relate to a decline in orders and that the Respondent anticipated that the layoff would last 2 or 3 weeks. As Sheenan and Shields were temporarily laid off, they would be included in the unit unless there is positive evidence that they had abandoned their employment.

I believe the evidence is sufficient to show that Sheenan and Shield abandoned their employment (i.e., recall rights) at least by the end of January 1989. They had been employed for less than a month and had been living in a boarding house before they were laid off on December 30. At the end of January, when the Respondent unsuccessfully sought to contact them, the Respondent learned they had moved from the area without leaving forwarding addresses. Thus, at least as of that date, Sheenan and Shields were no longer in the unit.[4]

As stated above, I also believe that the record reasonably supports finding that Sheenan and Shields had abandoned their employment at least Monday, January 23, 1989. They had been employed for less than a month and were living in a boarding house when they were laid off on December 30. When they were laid off they were told that the layoff would be for 2 or 3 weeks. Yet, neither Sheenan nor Shields made any effort to contact the Respondent. Their failure to contact the Respondent when more than 3 weeks (the maximum expected period of layoff) had passed, especially in light of their short employment tenure and their transient living arrangements, is I believe sufficient evidence to find that they had abandoned their employment at least as of January 23.[5]

Accordingly I would find that the record establishes that the Union had majority status on January 23,

[14] The Union's majority was established on the previous day, January 12. Only 3 of the 27 cards were undated. Testimony establishes that those three signed by January 12. Of the dated cards, none contain a date later than January 12.

[1] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[2] The exclusion of Sheenan and Shields from the unit is crucial to establishing the Union's majority status. The Union has 27 valid authorization cards. The unit, after the various inclusions and exclusions made by the judge and my colleagues, consisted of 53 employees. Thus, Sheenan and Shields (neither of whom signed an authorization cards) are included in the unit, the Union would not have attained majority support.

I agree with the judge and my colleagues that Dennis Plaisted and John A. Howryla should not be included in the unit, but I do so solely on the grounds that they lack a community of interest with the unit employees.

[3] Although the Union's bargaining demand was made nearly 2 weeks before the date, a bargaining demand, at least in the presence of unfair labor practices, is a continuing one. *Jimmy-Richard Co.*, 210 NLRB 802, 807–808 (1974). It would be futile to require a new demand in the face of an employer's unfair labor practices.

[4] Even though Sheenan and Shields are excludable as of this date, the Union did not then have majority status. The size of the unit was increased when Robert Hiles was rehired on January 25, 1989. Thus, at the end of January the Union would have had only 27 cars in a unit of 54 employees.

[5] There is no evidence that employees Rearick and Whitehair had, like Sheenan and Shields, left the area. In any event, in light of my findings that Sheenan and Shields should be excluded, I find it unnecessary to decide whether Rearick and Whitehair are properly included in the unit.

1989.[6] As all the other elements of a *Gissel* bargaining order are present, I agree with my colleagues that a *Gissel* bargaining order is warranted.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate our employees concerning their union activities.

WE WILL NOT engage in surveillance of the union activities of our employee and WE WILL NOT create in the minds of our employees the impression that their union activities are the subject of company surveillance.

WE WILL NOT threaten to discharge employees because of their union activities and WE WILL NOT tell employees that other employees have been discharged for engaging in union activities.

WE WILL NOT solicit employees to withdraw their union authorization cards.

WE WILL NOT promise employees unspecified benefits if they cease supporting the Union.

WE WILL NOT tell employees that we will never recognize a union, will never bargain with a union, or will never sign a contract with a union.

WE WILL NOT tell employees that engaging in union activities would be futile because company officers have bought off unions before and will buy them again.

WE WILL NOT threaten to reduce production or to close the plant if a union represents our employees.

WE WILL NOT threaten to withhold pay increases or to cease investing in the Company if a union represents our employees.

WE WILL NOT advise employees that their reinstatement is conditioned on abandoning support for the Union.

WE WILL NOT promulgate or enforce an overly broad no-solicitation rule.

WE WILL NOT discharge or lay off employees or otherwise discriminate against them in their hire or tenure in order to discourage their support and activities on behalf of Aluminum, Brick and Glass Workers International Union, AFL–CIO–CLC or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All of the full-time and regular part-time employees employed at our Renfrew and Kittanning, Pennsylvania, factories, exclusive of office clerical personnel, salesmen, professional employees, guards and supervisors as defined in the Act.

WE WILL offer immediate and full reinstatement to Steven Six, John McKinney, Gary Bowser, Virgil K. Cousins, John Baker, James A. Wright, and Charles Colton to their former jobs or, if their former jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and we will make them whole for any loss of earnings and other benefits resulting from their discharge or layoff, less any net interim earnings, plus interest, unless we have already done so.

WE WILL notify each of them that we have removed from our files any reference to his discharge or layoff and that the discharge or layoff will not used against him in any way.

> CUSTOM BENT GLASS COMPANY, CUSTOM GLASS CORPORATION, SAXONBURG INDUSTRIES, AND CUSTOM RESOURCES COMPANY

Donald J. Burns, Esq. and *David L. Shepley, Esq.*, for the General Counsel.
Thomas H. M. Hough, Esq., of Pittsburgh, Pennsylvania, for the Respondent.
R. Michael LaBelle, Esq., of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALTER H. MALONEY, Administrative Law Judge. This case came on for hearing before me on an unfair labor prac-

[6] As Sheenan and Shields are excluded from the unit, on this date the unit consisted of 53 employees, and the Union had 27 authorization cards, a bare majority, but nonetheless a majority.

tice complaint,[1] issued by the Regional Director for Region 6 and amended at the hearing, which alleges that Respondent Custom Bent Glass Company and several joint employers[2] violated Section 8(a)(1), (3), and (5) of the Act. More particularly, the amended complaint alleges that the Respondent engaged in a variety of independent violations of Section 8(a)(1) of the Act, including coercive interrogation, surveillance of union activities, threats to close the plant or portions of it in the event of unionization, solicitation of employees to repudiate their union designation cards, statements to employees that union supporters had been identified and fired, threats to get rid of union supporters, threats to refuse to bargain with a union in the event of unionization, threats to cease investing in the Company and to withhold pay increases in the event of unionization, creating the impression of surveillance of union activities, conditioning reemployment on ceasing to support the Union, and discharging or refusing or delaying reinstatement of eight employees because of their union activities.[3] The amended consolidated complaint also alleges that the Union represented a majority of the employees in an appropriate bargaining unit and that the Respondent wrongfully refused to recognize and negotiate with the Union. For this asserted violation the General Counsel seeks a so-called *Gissel*[4] remedy requiring the Respondent to recognize and bargain with the Union. The Respondent denies these allegations and asserts that certain employees named in the complaint were laid off for economic reasons and others were terminated for an assortment of causes. Its defense relating to employee Fred Pagliari is that Pagliari was a manager and not an employee who enjoyed the protections of the Act. Respondent denied that the Union ever achieved majority status and denie that it has any obligation to recognize or bargain with it. On these contentions the issues herein were joined.

[1] The principal docket entries in this case are as follows:

Charge filed by Aluminum, Brick and Glass Workers International Union, AFL–CIO–CLC (the Union) against the Respondent in Case 6–CA–21537–1 and –2 on January 17, 1989; additional charges in other subdockets filed by the Union against the Respondent on January 12, 20, and 25 and February 9, 1989; original consolidated complaint issued by the Regional Director for Region 6, against the Respondent on March 1, 1989; Respondent's answer filed on March 14, 1989; complaint issued by the Regional Director for Region 6, against the Respondent on March 21, 1989, in Case 6–CA–21537–4 and consolidated with the original consolidated complaint on June 9, 1989; Respondent's answers filed on March 30 and June 22, 1989, respectively, to these complaints; hearing held in Kittanning, Pennsylvania, on July 10–13, 1989, and August 8, 1989; briefs filed with me by the General Counsel, the Charging Party, and the Respondent on or before October 5, 1989.

[2] Respondent admits, and I find, that Custom Bent Glass Company and Custom Glass Corporation are companies doing business at Renfrew and Kittanning, Pennsylvania, where they manufacture flat glass and bent glass. During the 12-month period ending January 31, 1989, they manufactured and shipped from their Renfrew and Kittanning, Pennsylvania places of business directly to points and places outside the Commonwealth of Pennsylvania goods and materials valued in excess of $50,000. Accordingly, they are employers engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] The eight discriminatees named in the consolidated complaint, as amended, are Steven Six, John McKinney, Gary Bowser, John Baker, Virgil K. Cousins, Fred Pagliari, Charles Colton, and James A. Wright.

[4] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

FINDINGS OF FACT

A. *The Unfair Labor Practices Alleged*

Respondent operate two glass manufacturing facilities located in two small towns, Renfrew and Kittanning, which are about 25 miles apart in northwestern Pennsylvania. Custom Bent Glass, Incorporated, does business as Custom Bent Glass and is owned in substantial part by its president and chief operating officer, Thomas E. Rice.[5] Its principal products are flat glass and bent glass. The latter is used for architectural purposes and is normally manufactured to order. Respondent began its operation in 1984 in rented premises at Renfrew. However, the Renfrew plant proved to be too small and had poor insulating for certain types of glass manufacturing, so the Respondent purchased an abandoned clothing factory just outside Kittanning in 1988 and began to remodel it so it would be suitable for its own purposes. By the end of 1988 the Kittanning plant was in full operation and the Respondent was able to remove both its office and a substantial portion of its production activity from Renfrew.[6] Respondent still retains the Renfrew facility but it is now much the smaller of the two plants.

Respondent's employees have never been represented by a labor organization. Many of them are unskilled and have a limited employment history. Many have been hired under manpower training programs operated by state and Federal agencies, who subsidize wages for stated periods of time so that new recruits may acquire both job skills and an attachment to the notion of steady employment.

On or about December 1, 1988, Steven Six, a kiln worker on the night shift at Renfrew, contacted the Regional Director of the Charging Union by calling his office at Greensburg, Pennsylvania.[7] Six was referred to John Shinn, an

[5] Saxonburg Industries is owned by Rice's wife and son but he is its operating chief. (According to Rice, they ask his ''advice.'') Saxonburg was set up to take advantage of certain trade discounts which suppliers extend to brokers but not to manufacturers. Saxonburg buys various items used by Custom Bent Glass and then ''sells'' them to the Respondent at the discounted price. Custom Bent Glass is the biggest ''customer'' of Saxonburg. The rest of its purchases are sold on the open market at markups which are established by John Rice, the son of Thomas Rice and President of Saxonburg. Saxonburg occupies part of the Renfrew premises rented by the Respondent although its office and stock of goods is physically located in a separate part of the building. Its employees are paid on the Custom Bent Glass payroll and perform occasional clerical services for Custom Bent Glass. Saxonburg is plainly a joint employer with Custom Bent Glass and a proper Respondent in this case. However, it does not follow that its employees share a community of interest with Custom Bent Glass employees which would make them part of the same bargaining unit.

[6] The renovation of the Kittanning plant was accomplished with substantial assistance from the Commonwealth of Pennsylvania in the form of construction loans made payable from industrial improvement bonds issued by the state. In order to qualify as a recipient of these loans, Rice organized another corporation known as Custom Resources Company. Custom Resources has occasionally employed individuals who have worked for Custom Glass and then returned to the Custom Glass payroll. It has no other function than to assist the Respondent in obtaining public funds for the renovation and improvement of the Kittanning plant and is completely under Rice's control. Accordingly, I grant the General Counsel's motion to include it as a joint employer with the original Respondent.

[7] Six was hired by the Respondent in March 1988, and went on workmen's compensation in June when he injured his knee. He returned to work in September on limited duty. In early November, Six, who worked night shift, asked his foreman, Fred Farrari, to be excused during one shift. His request caused dispute and acrimony at the plant. Ferrari phoned Rice at the latter's home to inform him of the request. According to Six, he was given the night off. According to Respondent's witnesses he left without permission. In any event

International representative of the Charging Union, and a meeting was set up which took place on December 17 at Cub's Hall, a gymnasium and recreation hall in Butler, Pennsylvania. In attendance at this meeting with Shinn were Six, John McKinney, an insulator at the Renfrew plant, and Deron Bartell, a glass cutter. They discussed the mechanics of organizing the Respondent's plants. Shinn said he would like to obtain authorization cards signed by 50 percent of the employees. He noted that only a 30-percent showing of interest was necessary for an election but, with 50 percent, the Union could obtain recognition without an election. He also discussed the protections afforded to employees under the Act. Shinn had cards with him on this occasion and all three employees signed them. Shinn gave them additional cards and told them to make sure that they read the card before signing it and to make sure that everyone one at both plants who signed a card understood that, by signing a card, they were registering to form a union. The cards utilized by the Union during this campaign read:

> Aluminum, Brick and Glass Workers International Union, AFL–CIO, CLC Official Membership Application and Authorization
>
> I hereby apply for membership in the Aluminum, Brick and Glass Workers International Union, AFL–CIO, CLC, I hereby designate and authorize the Aluminum, Brick and Glass Workers International Union, AFL–CIO, CLC, as my collective bargaining representative in all matters pertaining to wages, rates of pay and other conditions of employment. I also authorize the Aluminum, Brick and Glass Workers International Union, AFL–CIO, CLC, to request recognition from my employer as my bargaining agent.

Below this printed heading were spaces designated for signature, name of employer, date, name of applicant, address, and telephone number.

Cards were circulated thereafter both at the Kittanning and Renfrew plants by employees John McKinney, Gary Bowser, John Baker, and possibly others. McKinney used the Respondent's intracompany mail to transmit cards to Bowser for use at the Kittanning plant. Six was not working at the time. He had been laid off on December 10 but was acting as the contact man between the Union and the solicitors at these plants. The Union ultimately collected and submitted to the Board 28 signed authorization cards. Of this number, 15 were executed by card signers on or before December 30, 1988. The rest were executed on or before January 12, 1989.[8]

On December 30, the Respondent laid off eight individuals for reasons of economic necessity.[9] The General Counsel does not challenge this assertion but does contend, as discussed later, that discriminatee John Baker was included among those selected for layoff for discriminatory reasons. Three of these employees never returned, two were recalled on January 9, and one applied to come back July 1989 and was rehired. Baker, the alleged discriminatee, was recalled on March 22, and employee Dean Crawford was recalled on March 24.

On January 4, McKinney, who worked at the Renfrew plant, had a discussion with Chris Cotton, the Renfrew plant manager, concerning the Union. He went as far as to offer Cotton a card. Cotton declined and walked away. The following day McKinney noticed that his name was not on the work list for the following week and asked Cotton the reason. Cotton said that McKinney was being laid off because work was slow. A week later, McKinney received a letter, dated January 12, from Cotton notifying him that he was being terminated, effective January 12, for ''repeated failure to follow your supervisor's instructions, insubordinate attitude and always continually arguing, all of which have resulted in poor workmanship, scraps, rejects, and customer dissatisfaction as well as extensive monetary loss to the Company. The Company policy has always been to send an employee home from work until all the facts are evaluated and a discussion is made on the facts.'' The letter was the first notification McKinney had received that his job performance had been in question or that the absence of his name from the assignment sheet had been occasioned by anything other than sluggish economic conditions.

The Union conducted two organizational meetings in early January, one at the Cubs' Hall in Butler and the other at Hose Company No. 6 Fire Hall in Kittanning. The first meeting took place on January 7 and the second occurred on January 11. Among those in attendance at the first meeting were Baker, Six, Cousins, McKinney, and employee Joseph Hockenberry. At this meeting Baker turned in several signed cards which he had collected. Additional blank cards were given to other employees for distribution. On January 10, Shinn sent Rice a letter which read:

> You have been aware for several weeks that the above named Union has been conducting an organizational drive for unionization of the above-named facilities.
>
> During this period and continuing to present day, you and your agents have been violating the rights of the employees as guaranteed under Section 7 of the Federal Labor Laws.

The letter went on to outline to Rice certain organizational rights which are protected by statute and to warn him that the Union would protect those rights to the fullest extent. Rice denies knowing the existence of an organizational drive as early as December 30 but admits learning about it during the first or second week of January[10] and before giving

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he was laid off for 2 days but was allowed to return on or about November 8 after speaking personally to Rice.

[8] Some 23 of the 28 authorization cards in evidence in this case bear a time and date stamp of January 13, 1989, from the Board's Pittsburgh Regional Office where the cards had been submitted along with the Union's representation petition in Case 6–RC–10144. The petition was mailed to the Regional Office on January 12 and received on the morning of January 13. The other five cards bear the Board's time and date stamp of January 17, 1989. I take official notice of that stamp.

[9] The eight employees laid off on December 30, 1988, and their dates of original hire are as follows: John Baker (9/14/88), Greg Rearick (9/16/88), John Whitehair (9/19/88), Dean Crawford (9/19/88), Kenneth Mohney (9/26/88), James D. Morgan (9/26/88), Jonathan Sheehan (12/6/88), and Randy Shields (12/6/88).

[10] The Respondent's defense in this case was accomplished with more than a routine amount of intimidation and perjury found in a hotly contested Board proceeding. Rice and his vacillating supervisors were far from credible witnesses, both on the basis of demeanor and by reason of internal and external contradictions in their stories, including contradictions from company records. *Continued*

speeches to assembled employees at Renfrew and Kittanning on the subject. I credit the testimony of Donald Myers that, as early as August 1988, he held a conversation with Respondent's vice president, George Sutorka, in which Sutorka told Myers that Rice had phoned him to say that Myers was involved in organizing a union. Myers denied this accusation, which occurred about 3 months before the Union herein began to distribute cards. He asked Myers how he felt about unions. Myers replied that he could ''take them or leave them.'' Sutorka warned him that the Company would not tolerate a union and that Myers or anyone else who talked union would be fired.

The second general union organizational meeting (and the third of any kind) took place on the evening of January 11 at the firehouse. It was attended by about 17 employees. Authorization cards were signed or turned in at this meeting. The fire hall is located in the Borough of Kittanning, a mile or two from the plant and much closer to the homes of most of the Respondent's employees than the plant at Renfrew. Company Supervisors Scott Steffi and Joe Cook, as well as Jerry Samosky whose supervisory status is in dispute, knew of this meeting. They were out drinking at a bar called Twin Pines, located on the outskirts of town, and started riding around in a car. They assertedly were in search of a six-pack of beer and drove to another bar known as B. J.'s, which is located within the borough about a block or so from the firehouse. They drove past the firehouse and noticed that cars belonging to some of the Respondent's employees were parked outside. One vehicle they recognized was a pickup truck belonging to employee Dewayne Stevenson. The next day Cook brought this fact to the attention of employees Gerald Brocious, James Wright, and Ron Smail, telling them that he knew they had attended the union meeting which had been held the previous evening. Samosky asked one group of employees who was going to be the union president.

On January 12, Shinn wrote a letter from the union office at Greensburg, Pennsylvania, to Rice in which he asserted that the Union represented a majority of the production and maintenance employees at both Renfrew and Kittanning. He demanded recognition. In that letter Shinn stated that the Union was willing to submit signed authorization cards to a third party for verification. Along with this letter Shinn forwarded two letters, both dated January 11 and signed respectively by McKinney and Cousins. They were identical in form. In these letters McKinney and Cousins stated that they supported the Union and insisted on recognition by the Company of their right to assist the Union in organizing the Respondent's facilities.

On the same day, Rice gave massed assembly talks to employees at both plants.[11] The first one took place at Renfrew during the morning hour and was delivered to a small gathering of about 15 employees around a work table. Rice said at this meeting that he was aware that the Union was organizing the plant and mentioned that he had a list of those who had attended the union meeting the night before. He stated that he knew who was there and who was not there. Rice then asked Dewayne Stevenson what he thought of the union meeting he had attended the previous evening at Kittanning. Stevenson simply got red in the face and made no reply.

Rice said that employees had the right to organize but they could not do so on company property, adding that a couple of employees at the Kittanning plant had done so and had been fired. He told the employees that he did not want them to organize the Union and warned them that he had bought off unions before and would do it again. He also told employees that he would not sign a contract with a union.[12] Rice told the Renfrew employees that the lease on the Renfrew plant was scheduled to expire in a year and he had a 2-year option on it. He did not know at that time whether or not he would renew it. Rice then announced he was thinking of moving the plant to a new location 5-miles away. He also said that the flat glass product line was running a low profit and that the Respondent could not compete in this line with other companies. He was thinking of changing product lines and manufacturing a thicker, more expensive glass and shutting down the flat glass operation, but, at that point, he was not sure what he was going to do.[13] Rice stated that the older people who had been with him from ''day one'' would always be assured of a job. In this connection he mentioned Cotton, Geibel, Tom Higgins, Elmer Covert, and Bob Beatty by name. He also said that he knew who was trying to ''take him down'' and he would get rid of them.

Rice went on to tell the Renfrew employees that he realized that many of them were young and did not know much about unions so he would tell them what unions were like. He said that the first and most important thing that unions try to do is to establish seniority but the Company already had seniority, more or less.

Following the meeting, Cousins had a private conversation with Cotton concerning Rice's remarks. Cousins mentioned to Cotton that he thought that Rice was serious about what he had said concerning unionization. Cotton agreed but told Cousins that he had nothing to worry about. At this point in the conversation Cousins told Cotton that he had signed a paper that would be sent to Rice with a union petition saying that he was in favor of it. His reference was to the letter dated January 11 which he had signed at the union meeting at the firehouse. Cotton said that Cousins probably did not have anything to worry about since Rice liked his work. He indicated that he would speak to Cousins later to see if

Individual employee card signers were summoned by the Respondent for the purpose of repudiating their union authorizations or providing evidence which would require the Board to invalidate their cards. They testified within a few feet from where Rice was sitting. They clearly appeared to be afraid for their jobs and anxious to ingratiate themselves with a company president who had been quite adamant in letting them know his opposition to the unionization of the plants. I place little reliance on their testimony as well.

[11] There is some difference in the record as to whether the Kittanning speech took place on Thursday, January 12, or Friday, January 13, but this question is immaterial to the resolution of the case. I discredit Cook's testimony that the Kittanning meeting took place on Wednesday, January 11. Both speeches took place after the January 11 union meeting at the Kittanning Fire Hall.

[12] Rice and other Respondents witnesses tried to soften the impact of this remark by saying that Rice told employees that he would not personally negotiate a contract but would leave it to others to do the negotiating, reserving to himself the final approval of any contract proposals. I discredit this testimony and credit Hockenberry's testimony, as set forth above.

[13] At the time of the hearing, the Respondent was still producing flat glass. However, in January 1989, this line had been discontinued at Renfrew and was being concentrated at Kittanning. When Cotton was asked why Rice was bothering to discuss the prospects for flat glass production at a plant where it had already been discontinued, he said that he did not know.

unionization is what Cousins really wanted. As outlined later, Cousins was fired the next morning.[14]

Rice then spoke to a somewhat larger gathering at the Kittanning plant. He began by saying that he was not in favor of unionization and he did not know why employees were trying to organize, adding that he was trying to be fair with employees. He reminded them that the Respondent was just a small company and was just starting out in business. He also told the assembled gathering that he had gotten rid of the two main individuals[15] in the union effort. He knew there were more and he would find out who they were. He went on to say that, if the Union came in, he would shut down the flat glass line or run it at minimum production with people he could trust. There would be no raises and he would not put any more money into the Company until the whole union question was resolved. If the Union persisted, he would simply close down the entire plant, take his money, and go home because he did not need the Kittanning employees to run his plant. There were other places where he would operate a factory. He said that he did not want a union and would not negotiate with one because he could not afford one. In that event employees would simply be out on a picket line without a job.

After Rice finished speaking, Sutorka added a few words of his own to Rice's remarks. He told the employees that they should be careful before signing a union card and suggested that newer employees who had never dealt with unions before should speak with others who had, such as Samosky, Myers, Mohney, Morgan, Covert, and Higgins. He said that he and Rice had an open door policy and would be glad to talk with any employees who had questions about the Union. He urged people to pull together, mentioning the fact that the Company was having quality control problems and was losing money on the flat glass line.

On the afternoon of January 13, at the end of the day shift, Shinn began to distribute union leaflets in front of the Kittanning plant. He stood at the driveway entrance and handed leaflets to seven or eight employees. Immediately after his arrival, Sutorka, Samosky, and Mary Cirillo, a clerical employee, emerged from the plant and began to watch him. Sutorka stood about 10 feet from Shinn, near a point where the driveway meets the public road; Samosky stationed himself on a porch attached to the factory building about 80–90 feet away.

During the 2-day interval of January 12 and 13, the Respondent discharged five employees, all of whom were card signers. Six, who had been on layoff status for more than a month, received a letter dated January 12 from Cotton telling him that he was discharged for ''refusal to work and walking off [an] assigned shift after being told of the consequences of doing so'' and, after returning to work on probationary status,'' violating company rules by soliciting, lecturing, and continually interrupting other employees' work.'' As indicated before, McKinney, who had been on layoff status since January 4, received a discharge letter, dated January 12 and signed by Cotton.

On January 13, Cousins, who had mentioned on the previous day to Cotton the fact that he had signed a union form, was summoned to Cotton's office by Scott Geibel, where he was told by Cotton that he was being fired for unsatisfactory completion of his probationary period. Cousins asked Cotton what that meant in plain English. Cotton replied that it meant that Cousins had a poor attendance record—too many days off and too much tardiness. A week later, Cousins came to the Renfrew plant to turn in his uniform and to get his final paycheck. He spoke with employee Rick Moses, who said he would have to check with Rice before releasing the paycheck. After this conversation ended, Cousins asked to speak to Rice over the phone. Rice said he would talk to Cousins that afternoon. Later on Cousins phoned Rice and asked for his job back. Rice replied that Cousins would have to straighten up his act. Cousins promised that he would do so. Rice then said he would still have to determine whether Cousins should return to work at Renfrew or at Kittanning so he would have someone phone Cousins to inform him which one it would be. Cousins then told Rice that he knew why he was being fired. Rice's response once again was that Cousins would have to straighten up. Cousins asked Rice if Rice wanted him to retract his union card and the affidavit he had given to the Board. Rice said that this would not be necessary. Cousins resumed working for the Respondent on February 1 at the Kittanning plant.

On December 29, Gary Bowser signed a union card. Between that date and the time he was discharged on January 13, he had solicited cards from other employees at Kittanning. During this period of time, Sutorka spoke to him in the cutting area of the kiln room and told Bowser that he had heard rumors that Bowser was advocating and soliciting for a union. Bowser denied doing so but told Sutorka that, if anyone were to hand him a card, he would sign it. On the morning of January 13, Supervisor Scott Steffi asked Bowser to report to Sutorka's office. When Bowser arrived, Sutorka told him point blank that he was discharging him for soliciting and for campaigning for a union on company time and company property. Bowser asked Sutorka who had told him that he had been campaigning for a union on company time and company property. Sutorka refused to say. In his testimony in this case, Sutorka stated that Bowser had been reported by employee Donald Montgomery.[16]

Employee James A. Wright was discharged on January 13 under much the same circumstances. He had signed a union card on December 29 and had attended one of the Union's organizational meetings. Wright was one of the employees to whom Cook was speaking when he disclosed that he had been riding up and down in front of the firehouse to find out who was attending a union meeting. On January 13, Wright was summoned to Sutorka's office and discharged by Sutorka for engaging in union activity on company time and for making ''terroristic'' threats. When Wright asked Sutorka who had accused him of making ''terroristic'' threats, Sutorka refused to say.[17] Later on in the day, Cook spotted

[14] I discredit Cotton's assertions that he never discussed the Union with Cousins and that Cousins never told him that he was active on behalf of the Union.

[15] There is disputed testimony in the record that Rice referred to the instigators of the union effort in scatalogical terms. It is not necessary to resolve this factual question.

[16] Montgomery was summoned by the General Counsel to testify on other matters and was not asked to corroborate or to deny Sutorka's claim that Bowser had solicited for the Union on company time or property in violation of a company rule. No company rule was placed in evidence forbidding any kind of soliciting.

[17] In his testimony in this case, Sutorka stated that it was Dennis Plaisted, an office employee, who had reported to Rice that Wright had threatened to

Continued

Wright walking along a roadside and gave him a lift in his car. As they were riding along, Cook told Wright, ''Don't worry. After this all blows over, [you] will get your job back.''

Rice testified that a lot of employees told him that they had signed cards. Among this number he mentioned Brocious, Nick Valerio, Stevenson, and Hockenberry. At Rice's request, Valerio showed him a union card. Employee William Best and other employees showed Rice blank cards they had received. According to Rice, a number of employees mentioned to him that they would like to retract their cards.[18] Rice admitted that he phoned the Board's Regional Office in Pittsburgh to obtain information about how an employee could retract his union card. He learned that any letters of retraction would have to be sent to the Union's regional office in Greensburg, Pennsylvania; he gave this information to group leaders. While denying that he had instructed any employee to draw up a form to facilitate the retraction of union cards, Rice stated that he knew that such forms had been prepared and left in the plant for employees who wished to use them. The form contained the name and mailing address of the Union's regional director and stated in its text:

> This is to advise you that I am taking this means of withdrawing my application for membership in the Aluminum, Brick and Glass Workers Union.
>
> I will vote ''no union'' if election is held.

The Union received signed retraction forms from employees Hockenberry, Diane Raimondi, Howard L. White, Montgomery, Valerio, and Karen Goodgasell.

Discriminatee Fred Pagliari was an employee of Respondent Saxonburg Industries and worked in a section of the Renfrew plant which had been sectioned off and assigned to Saxonburg. He was hired on September 19, 1988, for $6 an hour and given the title of manager, although, for much of his tenure as a Saxonburg Industries employee, he had no one to manage. He reported to John Rice, the son of Thomas Rice, who is the president of Saxonburg Industries. John Rice normally works at Kittanning, not at Renfrew, so Pagliari had no onsite supervision during most of his work day. On October 24, 1988, Rick Moses was hired by Saxonburg Industries and was trained to replace Pagliari. He now has Pagliari's title and job functions although those functions have changed slightly as Saxonburg Industries has enlarged its activities. Pagliari did some selling of Saxonburg Industries inventory items, assisted with the bookkeeping, did routine banking and wrote checks for purchases, made deliveries, drove a pickup truck, and performed minor clerical chores for Custom Bent Glass at Renfrew. On December 21, 1988, Pagliari signed a union card which was presented to him by McKinney. On January 17, 1989, he was fired and replaced by Moses. Pagliari did not testify in these proceedings, so the record is incomplete as to his version of the events which surrounded his discharge. John Rice testified that Pagliari was discharged for excessive absenteeism and poor recordkeeping, including poor maintenance of inventory records.

Charles Colton, a laminator at the Kittanning plant, was hired in August 1988. He signed a union card which Baker had given him and attended both union meetings in January.[19] He also solicited cards from at least two other card signers. Sometime in January, Rice had a conversation with Colton concerning the organizing activity. The thrust of a question put to Colton by Rice was whether there was anything that he could do to satisfy employees so they would not be seeking help from a union. Colton replied that there was not and admitted to Rice that he was attending union meetings. When Rice asked Colton why he was attending these meetings, Colton simply replied that he wanted to see both sides of the story. Colton was laid off on January 20 ostensibly for lack of work. Cook told him that business was slow but that he would be recalled. Colton obtained other employment shortly thereafter and was never recalled.

On January 20, Rice held another general meeting with Kittanning employees at which he discussed company business. In the course of this meeting he mentioned the organizing of the plant. I credit the testimony of employee Ronald Small that Rice said on this occasion that he had a list of those who had attended the union meetings and that he knew the names of each and everyone who had done so. Rice repeated his early statement that he would never recognize a union and would never negotiate a contract. I also credit the testimony of Colton that Rice mentioned during this talk that union card revocation slips were available and had been posted on the company bulletin board. Rice complained that he had taken a lot of the employees then working at the plant off the street and expressed his dismay that unionization was all the thanks he had gotten for his efforts. He stated that he had fired a few union supporters and, if he found others, he would fire them too. He went on to say that, if the Union wanted an election, he would be glad to have one there and then so unionization would be stopped and the Company could get back on track.

Both before the Union began its organizing drive and throughout the events of December 1988, and January 1989, Rice and other supervisors held private conversations with a number of employees in which they expressed company opposition to the unionization of the plants in most emphatic terms. Some of these conversations took place during job interviews. The application form for employment with the Respondent filed by Six in the spring of 1988 disclosed that he had previously worked for a unionized glass manufacturer. During an employment interview which took place on March 24, 1988, Rice told Six that he did not like unions and did not want a union in the plant. Rice warned Six that, if he attempted to form a union at the Respondent's plant, Rice would ''fire his ass.''

McKinney began working for the Respondent in December 1987. In the course of his employment interview, Rice asked McKinney how he felt about unions. McKinney replied that it did not matter to him one way or the other. Rice then told

do serious damage to his auto. Rice testified that Plaisted had brought this complaint to Sutorka, not to him. In his testimony, Plaisted testified credibly that he had not made any complaint about Wright to anyone, that Wright had made no threats at all, and that he felt that Wright was just ''blowing smoke'' when Wright said to a group of employees that they would ''get'' anyone who did not vote for the Union.

[18] There is no corroboration in this record for Rice's claim that any employees told him that he would like to resign from the Union or retract his card. I discredit this statement.

[19] In addition to the meetings previously mentioned, the Union held a meeting at the Kittanning firehouse on January 19. This is one of the two meetings referred to by Colton in his testimony.

him, ''We really don't need one here.'' Hockenberry came to work for the Respondent in May 1987. During the course of his employment interview, Rice told him that the Company did not need a union and that Hockenberry would be better off if he did not have anything to do with unions. Hockenberry replied that he had never had anything to do with unions so he did not know whether they were good or bad.

Patrick Claypoole started with the Respondent in July 1988. In an employment interview with Rice which took place on July 6, 1988, Rice told Claypoole that he was not in favor of unions and that the plant was better off without one. He warned Claypoole that, if Claypoole mentioned unions, he would ''be out the g.d. door.'' Claypoole's response was that he never had anything to do with unions. In mid-January, after the furor over the organizing effort had reached a high pitch, Claypoole had occasion to speak with Rice to inquire how much time he had in grade and when he would be eligible to receive fringe benefits. Rice took advantage of this occasion to ask Claypoole what he thought ''about this g.d. union bull shit that was going on.'' Claypoole replied that his brother worked at the Pullman-Standard plant and that a union did not do anything for him there, so he did not feel that he needed one. Rice then stated, ''Well, at least I know we got one good non-union vote.'' By that time Claypoole had signed a union card which was submitted to the Board along with the representation petition. He admitted on the stand that he had been lying to Rice on that occasion.

Sometime during the month of January, Rice called employee Lorne Fair to his office for a private talk. Rice told Fair that he was not for a union and asked Fair if he was. He also told Fair on this occasion that the flat glass line was not making any money and, if a union came in, he would reduce it to minimum production and operate with just a handful of people whom he could trust.

Wright was hired in August 1988, after an employment interview with Sutorka. During the course of this interview, Sutorka told Wright that, if he had anything to do with a union, the Company would get rid of him. In January 1989, a few days after the employee meeting at Kittanning in which he denounced the Union, Rice had occasion to speak with Brocious in the flat glass cutting area. Rice told Brocious that, if he would stay out of the Union, he would take care of him. In June 1989, Brocious was given the title of group leader in the kiln area, although this designation did not result in any pay increase.

Donald K. Myers was hired by the Respondent in June 1987. During his employment interview, Rice asked him how he felt about unions. Myers replied that he could take them or leave them. Rice then told Myers that he would not tolerate a union in the plant and that Myers and anyone else would be fired if they discussed unionizing. On January 13, in a private conversation between Myers and Cook following Rice's first speech to the Kittanning employees, Cook told Myers that Rice had meant what he said about shutting the plant doors if a union came in.

Donald Montgomery signed a union card on January 12. An hour or two later, Rice called him into the office and questioned him about the card. He began by asking Montgomery if he was nervous. When Montgomery replied that he was not, Rice said that he ought to be and called him a ''— asshole.'' When Montgomery asked Rice why he made such a statement, Rice told him that he just voted ''yes'' for the Union by signing an authorization card. Montgomery disagreed. Rice repeated that, by signing his name on the card, this was what Montgomery did. Montgomery told Rice that, the way he understood it, he had to be contacted by the Union one more time.

Early in January, Sutorka called several employees into his office to discuss their feelings respecting unionization. He stated on the stand that Rice had asked him whether Gary Bowser had solicited authorization cards on company property and surmised that Rice wanted this information because, as an owner, he was entitled to know what the employees were doing. Sutorka also testified that, later on in the year, he had asked Samosky whether Claypoole had signed a card because, ''as management, we needed to know.'' Sutorka testified that calling employees into the office to discuss the union drive was part of his ''open-door'' policy—if employees had problems or if anything was not right, Sutorka wanted employees to talk to management about it. Karen Goodgasell, who had signed a union card, reportedly told Sutorka during her interview that the Company had been very good to her and that she had no complaints and no thoughts of union activities. Doug Kolich, who had also signed a card, told Sutorka that he did not think that he would be in favor of a union. Sutorka also believed that he had one of these individual interviews with employee James Shannon, another card signer.

During the period when union organizing was particularly active, employee Donald Freeman was absent because of a long-term disability and was drawing workmen's compensation. Late in the evening of January 12, Rice phoned Freeman at his home to ask him to return some company uniforms which Freeman still had in his possession. During the course of the phone call, Rice accused Freeman of being the ring leader of the union movement and asked him, ''How could you do this to me?'' He told Freeman that he had concrete evidence that Freeman was the ring leader and reminded Freeman that he had told the insurance company that he thought that Freeman had a legitimate compensation case. Rice asserted that it was he who was feeding Freeman's family by letting compensation payments continue but threatened to call the insurance company and stop the payments because everyone was saying that Freeman was the one who had started the union effort at the plant. Freeman was still drawing workmen's compensation for a herniated disc at the time the hearing in this case took place.

In June or July 1989, Sutorka asked Samosky whether or not Claypoole had signed a card. Samosky phoned Claypoole from the plant and asked him if he had signed one. Claypoole said that he did not sign a card and Samosky relayed this information to Sutorka.

On advice of counsel, all five employees who were discharged on January 12 and 13, 1989, were rehired by the Respondent either in February or in March. All but Six are still employed. Six resigned in May to take another job. As noted previously, Baker was recalled in March.

Six is a Cherokee Indian and active in Indian affairs. Toward the end of February, a meeting was held in Rice's office involving Rice, Steffi, Sutorka, Six, and Billy Hayes, an official of the American Indian Council. The Council is a private organization to which Six belonged. The purpose of

the meeting was to discuss the possible reinstatement of Six. Rice began the conversation by asking Six what he was doing with his life. Six replied that he was now drawing unemployment compensation. Rice commented that the ''union stuff'' was all behind them and stated that Bowser was the only employee who had been fired for soliciting on company time. Rice then asked Six how he felt about the Union, expressing to Six that he had heard that he was the top man in the organizing drive. Rice told Six he would like to know if that was true. Six said he would rather not discuss the question of the Union but Rice brought it up two more times. When Six repeatedly refused to reply, Rice stated that, by not answering the question, Six had in fact answered the question. After persistent questioning, Six told Rice outright that he had signed a union card and was still in favor of the Union.

As noted previously, Baker had been in layoff status since late December. After an unfair labor practice charge had been filed on his behalf in January, Sutorka called Baker on the phone and asked why he had filed it. Baker replied that he wanted to know why two other employees who had been laid off at the same time, Morgan and Mohney, had been recalled ahead of him. Sutorka replied that they were working in the shipping and packing section. Early in March, Baker saw Sutorka in a bar located near the plant and struck up a conversation. In the course of the conversation, he told Sutorka that he was not the one who started the union drive. Early the following week, Baker was recalled to work.

The representation petition filed by the Union on January 13 has not been processed. It is currently blocked by the pendency of the charges which were filed in this case.

B. *Analysis and Conclusions*

1. Independent violations of Section 8(a)(1) and antiunion animus

Rice's fear that his plant would be unionized was demonstrated repeatedly long before the Union involved in this case had formed any intention of conducting an organizing drive. When, in December 1988, the Union began to solicit cards, Rice lost all restraint and struck back without regard to any restrictions imposed on his prerogatives by the Act. As a result, the record herein is replete with acts demonstrating animus. In instances where the prosecution of these acts is barred by limitations, they at least constitute evidence of the Respondent's hostile state of mind. In most instances, they constitute independent violations of law.

Over a long period of time, both Rice and Sutorka took advantage of job interviews to make known their own feelings about unionization and to inquire about the attitude of the applicants. A job interview is a particularly sensitive occasion; hence questions relating to an applicant's feelings on the subject of unionization that are asked on such occasions have a particularly intimidating and long-lasting impact. This is especially true when they are accompanied either by threats or statements of company policy in which a threat is implicit rather than explicit. The following are independent violations of Section 8(a)(1) of the Act or examples of antiunion animus committed by the Respondent:

(a) When Rice interviewed Hockenberry for a job in May 1987, he told Hockenberry that the Company did not need a union and that Hockenberry would be better off not having anything to do with a union. When Myers was hired in June 1987, he was asked by Rice how he felt about unions. He was then told that the Company would not tolerate unions and that he would be fired if he talked union. When McKinney was interviewed for a job in December 1987, he was asked by Rice how he felt about unions and was told that the Company did not need a union at the Renfrew plant. In March 1988, Six was told by Rice on a similar occasion that the Company did not need a union, that Rice did not want one, and, if Six were to start a union, Rice would ''fire his ass.'' In February 1988, Gary Bowser was told by Rice that the Company did not want a union and was warned that, if he mentioned the word, he would be ''out the door.'' None of these remarks can be the basis of a prosecution for an independent violation of the Act since they were uttered more than 6 months before the first charge was filed in this case. However, the Board can and should rely on them in assessing the motives and attitude of this Respondent as they pertain to other violations of law alleged in the consolidated complaint, including violations pertaining specifically to Six, Bowser, and McKinney.

(b) Claypoole was hired in July 1988. He was interviewed for his job by Rice on July 6, less than 6 months before the first charge in these cases was filed. When Rice told Claypoole on this occasion that he would be ''out the g.d. door'' if he mentioned unions, Rice threatened a prospective employee with reprisal for engaging in union activities in violation of Section 8(a)(1) of the Act.

(c) Wright was hired in August 1988. When Sutorka told Wright during his job interview that he would be fired if he had anything to do with unions, Sutorka also threatened a prospective employee with reprisal for engaging in union activities in violation of Section 8(a)(1) of the Act.

(d) Cousins was hired in August 1988. During his job interview, Rice asked him how he felt about unions. This interrogation was coercive and a violation of Section 8(a)(1) of the Act.

(e) During a reinstatement interview in February 1989, Six was repeatedly asked by Rice whether he was the one who had started the union effort at the plant. When Six declined to respond, Rice ventured the observation that, by not answering his question, Six had in fact answered the question. This interrogation was plainly coercive and a violation of Section 8(a)(1) of the Act.

(f) Rice phoned Freeman late one night and accused him of being the ring leader of the union movement. At that time, Freeman had been off work for about 4 months on workmen's compensation. Rice then threatened to phone his insurance carrier and have Freeman's compensation terminated. The accusation of being a union ringleader, made in this context, is a threat of reprisal for engaging in union activities, although Freeman in fact had not been engaging in union activities. Rice's further statement carries with it the indicia of its own coercive character. Both statements violate Section 8(a)(1) of the Act.

(g) Sutorka called Mrs. Goodgasell, Kolich, and Shannon into his office during the same period of time that Rice had been denouncing the Union in massed assembly speeches. The record does not specify what specifically Sutorka asked them. Sutorka did recount what Mrs. Goodgasell and Kolich told him. Their presence in his office was not voluntary; their disclosures of unbounded loyalty to the Company, re-

cited by Sutorka, were obviously responses to questions put to them as to how they felt about the Union, not spontaneous effusiveness, as the Respondent suggests. I find these replies to be evidence of coercive interrogation concerning the union sentiments and expressions of the employees involved. They were certainly expressions that contradicted those they had previously evidenced by the signing of union cards. Such interrogations are violations of Section 8(a)(1) of the Act. Sutorka's announced reason for summoning these employees to his office, namely to find out what the Company could do to mollify the employee dissatisfaction that had led to a union drive, was a solicitation of grievances with a view toward adjustment, which also violates Section 8(a)(1) of the Act. I so find and conclude.

(h) In early January, Sutorka mentioned to Gary Bowser that he had heard rumors that Bowser was soliciting for the Union. This statement constituted the giving of an impression of surveillance of union activities, which violates Section 8(a)(1) of the Act.

(i) Sometime during the middle of January 1989, Rice spoke with Claypoole in his office and asked Claypoole what he thought about ''this g.d. union bullshit that was going on.'' Such interrogation is coercive and violates Section 8(a)(1) of the Act.

(j) On or about January 12, Rice questioned Montgomery about a union card that Montgomery had signed only a few hours before. He asked Montgomery if he was nervous and told him that he should be nervous for signing a union card. Rice then denounced him as a ''— asshole'' for having signed a card. Such interrogation and denunciation is coercive and violates Section 8(a)(1) of the Act.

(k) On or about January 20, Rice asked Colton why he had been attending union meetings. This statement creates an impression that Colton's union activities were under company surveillance and amounts to coercive interrogation, both of which violate Section 8(a)(1) of the Act.

(l) In mid-January Rice held a private conversation with Fair in which he asked Fair if the latter was in favor of a union. During the course of this conversation, Rice told Fair that, if a union came into the plant, he would cut production on the flat glass line. These statements constitute coercive interrogation and a threat to slash production in the event of unionization, both of which violate Section 8(a)(1) of the Act.

(m) On or about February 17, during a reinstatement interview, Rice asked Six repeatedly whether he was the employee who had started the union drive. Such repeated questioning was coercive and violates Section 8(a)(1) of the Act.

(n) In June 1989, when asked by Sutorka whether Claypoole had signed a union card, Samosky[20] phoned Claypoole and asked him if he had done so. The interrogation of Claypoole by Samosky was coercive and a violation of Section 8(a)(1) of the Act.

(o) In August 1988, Sutorka held a private conversation with Myers in which he told the latter that Rice had phoned to say that Myers was involved in organizing a union. Such a statement created the impression that an employee's union activities were the subject of company surveillance and is a violation of Section 8(a)(1) of the Act. Sutorka's further statements on this occasion, asking Myers how he felt about unions and threatening to discharge him or anyone else for talking union, constitute coercive interrogation and an illegal threat, both of which violate Section 8(a)(1) of the Act.

(p) Cook, Steffi, and Samosky, all of whom knew that a union meeting was to take place on the evening of January 11, drove past the firehouse where the meeting was being held and observed the motor vehicles of certain employees who were attending. The next day Cook mentioned to employees that he had seen employee cars parked at the meeting. At one and possibly both of his massed assembly speeches on January 12–13, Rice announced that he knew who each and every employee was who attended the union meeting. The cover story used by the supervisors in question to explain their presence in the locality of the firehouse at the time of the union meeting is a tissue-thin pretext. They had been drinking together in a bar on the outskirts of town and, for some unexplained reason, had to visit another bar near the firehouse in order to get more beer. I conclude that, by engaging in surveillance of the union meeting held at the Kittanning firehouse on the evening of January 11, the Respondent herein violated Section 8(a)(1) of the Act.

(q) On the afternoon of January 13, Sutorka, Samosky, and an office clerical employee stationed themselves outside the plant at a shift change to observe Union Representative Shinn as he distributed union literature to employees. Such surveillance of union activities of employees is a violation of Section 8(a)(1) of the Act.

(r) After Wright was fired, Cook gave him a ride in his car and told him that he would get his job back when all of this ''blows over.'' This statement is the equivalent of conditioning Wright's reinstatement to a cessation of union activities at the plant and is a violation of Section 8(a)(1) of the Act.

(s) Rice discussed with several employees the question of withdrawing union cards. He personally obtained from the Board office in Pittsburgh information as to how to go about withdrawing union cards and passed it along to company supervisors. Someone at the Kittanning plant drew up a form for the purpose of assisting card withdrawals and Sutorka placed copies of the form on the company bulletin board. Several card signers took these forms, signed them, and mailed them to the union office in Greensburg. All of this activity took place against the background of intimidation and coercion, which has been detailed above. In light of these factors, I conclude that the Respondent solicited employees to withdraw their union authorization cards in violation of Section 8(a)(1) of the Act.

(t) Rice told Brocious in a private conversation that he would ''take care'' of Brocious if the latter would abandon his union activities. While the promise of benefit made to Brocious was not specific, it does not have to be in order to be a violation of the Act. I conclude that Rice's statement to Brocious on this occasion constituted a violation of Section 8(a)(1).

(u) Late in January, Sutorka held a meeting of employees at Kittanning in which he explained to them the workings of a pay and classification system that the Respondent had adopted the previous August. In late January, some employ-

[20] As discussed later on, Samosky was a supervisor within the meaning of Sec. 2(11) of the Act. In the event that Samosky could be deemed to be only a rank-and-file employee, Sutorka's question to him regarding Claypoole's union activities and sentiments would be an interrogation by an admitted supervisor of one employee concerning the union activities of another, and thus a violation of Sec. 8(a)(1) of the Act.

ees were not receiving the minimum amount for their particular classification. Sutorka informed everyone present that, within the next calendar quarter, all employees would receive at least the minimum hourly rate prescribed for their job class. The amended consolidated complaint alleges that this announcement constituted an illegal promise of benefit.

An employer has the right to make pay adjustments of a routine and recurring character during the course of an organizing drive or the pendency of a representation petition without incurring the onus of an unfair labor practice finding. From this premise, it follows that it may also lawfully make announcements respecting such adjustments. In such instances, the General Counsel must show by a preponderance of the evidence that some additional factor exists which transforms this action into an unlawful promise of benefit. In this instance, the pay and classification system was established before the onset of the union drive. While the circumstances surrounding Sutorka's explanation of this system is suspicious, these suspicious are insufficient to support a finding of an unlawful promise of benefit. Accordingly, I will recommend that so much of the amended consolidated complaint which alleges that Sutorka's statements on this occasion constituted an unlawful promise of benefit in violation of Section 8(a)(1) of the Act be dismissed.

In the course of his talks to the Renfrew and Kittanning employees in mid-January on the subject of the unionization, Rice committed numerous independent violations of Section 8(a)(1) of the Act. They are as follows:

(a) By telling employees that he had a list of employees who had attended a union meeting which was held the previous evening, Rice created the impression that the union activities of employees generally were the subject of company surveillance, in violation of Section 8(a)(1) of the Act.

(b) By asking Stevenson, an employee in attendance at the Renfrew speech, what he had thought of the union meeting the previous evening, Rice also violated Section 8(a)(1) of the Act by creating the impression that Stevenson's particular union activities were the subject of company surveillance.

(c) The Respondent had no rules, either written or oral, that prohibited employees from soliciting on company time or property. One will look in vain to find such a restriction in the Safety Rules or Company Work Rules which were placed in evidence. Rice's statement that employees had no right to organize on company property is a misstatement of law. It amounts to the promulgation of an overly broad no-solicitation rule which interferes with protected activities in violation of Section 8(a)(1) of the Act.

(d) Telling employees that other employees had been fired for engaging in union activities on company property is an implicit threat that violates Section 8(a)(1) of the Act.

(e) Telling employees that he had bought off unions and would do so again is an interference with protected activities that violates Section 8(a)(1) of the Act.

(f) Telling employees that he would not sign a contract with a union is an interference with protected activities that violates Section 8(a)(1) of the Act.

(g) A statement to employees that Rice was not sure whether he would renew the lease on the Renfrew plant and that he was thinking of shutting down the flat glass line, made in the context of a speech replete with more explicit threats and other violations of the Act, amounts to a threat to reduce or discontinue operations in the event of unionization and violates Section 8(a)(1) of the Act.

(h) By stating to Kittanning employees that he knew who was trying to ''take him down'' and that he would get rid of them, Rice violated Section 8(a)(1) of the Act.

(i) By telling Kittanning employees in the course of his speech that he had gotten rid of the two main union organizers, Rice violated Section 8(a)(1).

(j) By threatening to close or reduce the operations of the flat glass line in the event of unionization, made during the course of the Kittanning speech, Rice violated Section 8(a)(1) of the Act.

(k) By threatening to withhold employee raises and future investment in the Company while a union drive was in progress, Rice violated Section 8(a)(1) of the Act.

(l) By threatening to withdraw his entire investment and to close the plant in the event of further unionization, Rice violated Section 8(a)(1) of the Act.

(m) By stating to Kittanning employees that he would not negotiate with a union, Rice violated Section 8(a)(1) of the Act.

Additional speech-related violations occurred in mid-January. When Cotton told Cousins that he agreed with him that Rice was serious about the threats which Rice had uttered in the course of the Renfrew speech, Cotton violated Section 8(a)(1) of the Act. When Sutorka followed up on Rice's speech by telling assembled employees that the Company followed an open-door policy and that he would be glad to talk with employees who had questions about the Union, Sutorka was soliciting grievances with a view toward adjusting them in violation of Section 8(a)(1) of the Act.

2. The discharges of union adherents

In considering the validity of individual terminations or layoffs which were addressed in the consolidated complaint, several common factors should be recognized which pertain to all eight cases and which support a finding of a violation in each instance. All discharges or layoffs occurred against a background of repeated and extravagant expressions of antiunion animus, including statements to the effect that union supporters would be rooted out and fired. All eight discriminatees were card signers and all were fired (or laid off) within the 3-week period when the Respondent was mounting its counteroffensive to the union drive. Timing was most suspicious with respect to five employees—Six, McKinney, G. Bowser, Cousins, and Wright—all of whom were fired in a span of 2 days following Rice's receipt of a letter from Shinn that formally notified him that a union drive was in progress.

With respect to the question of company knowledge of who was and who was not a union supporter, certain additional evidence of a general character should be noted. In justifying his inquiry to Samosky as to whether Claypoole had signed a union card, Sutorka testified that ''we needed to know'' how Claypoole stood because the Company was ''tallying up cards, as good managers should do.'' Sutorka added that he felt that the Company would be very remiss if it did not have such information so that its officers could know the position they were in. In testifying about Rice's question to him concerning Bowser's union activities, Sutorka ventured the opinion that Rice was probably asking the question because, as one of the owners of the Company,

Rice was entitled to know what all of its employees were doing. As found above, the Company engaged in surveillance of a union meeting at the Kittanning firehouse, and Rice announced to employees most emphatically that he knew who had signed cards and who had not done so. From these statements I conclude that the Respondent made it its business to find out who was supporting the Union, and in fact was aware of the identities of union sympathizers, quite apart from any specific evidence found in the record relating to company knowledge of the particular activities and sentiments of individual discriminatees.

(a) *Steven Six*. In the spring of 1988, Six was hired as a kiln worker at the Renfrew plant. Before coming to work for the Respondent, Six had worked in a unionized glass factory and the Respondent was aware of this fact. In his initial interview, Rice told Six that he did not want a union in the plant and would ''fire his ass'' if Six started a union. Six was, in fact, the employee who set in motion the Union drive at the Respondent's plants late in 1988 by calling the Union's Regional Director in Greensburg and arranging a meeting on December 17 in Butler between Shinn, himself, and two other employees. At that meeting Six signed a union card. Although he was on layoff status at the time, Six coordinated the activities of card solicitors at the plants with union headquarters in Greensburg. He attended the organizational meetings at Butler and the Kittanning firehouse in early January. It is obvious that Rice had long harbored the suspicion that Six not only was a union sympathizer but the man who had instigated the whole union effort, since he repeatedly questioned Six on this point when the parties met in February to discuss Six's reinstatement. Rice's suspicion was well founded.

Six had a serious run-in with the Respondent in early November after he had returned from sick leave and was placed on light duty. Notwithstanding this dispute, he was allowed to return to the plant and to continue working, without further incident, until December 10, when he was laid off. At that time, Six was told that he was being laid off because of lack of work. He was given no inkling that it was occasioned for any disciplinary reason.

On January 12, more than a month after the layoff had taken place, Six was discharged. The discharge letter signed by Cotton recited that the reasons for the discharge related to the early November incident with Night Supervisor Ferrari and for violating company rules by soliciting, lecturing, and continually interrupting other employees at work. In fact, Six had been back to work following the incident involving Ferrari for a month at the time of the December 10 layoff. Between December 10 and the January 12 discharge, he had done no soliciting, lecturing, or interrupting of employees at work because he had not even been at the plant. The only significant event which had occurred during this interim was the notification sent to Rice by Shinn telling him in writing about the organizing drive. Cotton's letter does not mention the purpose for which Six had been soliciting. As noted above, the Respondent had no published rule forbidding soliciting at the plant. Rice's testimony that he had personally contributed to a charitable cause for which Six had been seeking donations constitutes an implied approval on the part of Respondent's management for in-plant soliciting. The pretext offered by the Respondent for the discharge of Steven Six is a flimsy one indeed. It is obvious from this sequence of events that Six was discharged for union activities in violation of Section 8(a)(1) and (3) of the Act. I so find and conclude.

(b) *John McKinney*. McKinney was a bent glass insulator who worked principally at the Renfrew plant, although he was detailed on occasion to Kittanning. During his hiring-in interview, McKinney was asked by Rice how he felt about unions. McKinney gave a noncommittal answer. In late December he discussed the question of unionization with other employees at the Renfrew plant and attended the small meeting on December 17 in Butler, at which time he signed a union card. He also passed out cards to several employees at the plant. Early in January 1989, he disclosed his union sympathies to Cotton, even going so far as to offer Cotton a card. The following day he was laid off. Within a week he was discharged.

McKinney was told on or about January 5 when he was laid off that the layoff was for economic reasons. Like Six, he was given no hint that his removal from the payroll was occasioned by anything other than a temporary downturn in business. Immediately after he left the Renfrew plant, two employees from Kittanning, Becker and Stevenson, were transferred to Renfrew to replace McKinney doing insulating work. On January 12, Cotton wrote McKinney a discharge letter, reciting therein a long list of his deficiencies as an employee, including his failure to follow a supervisor's instructions, insubordinate attitude and actions, continually arguing, poor workmanship, scraps, rejects, and customer dissatisfaction. These matters had not been brought to his attention previously. At the hearing the Respondent tried to pin on McKinney the responsibility for a defect in an order of glass which had been produced, in part, by McKinney at Renfrew, casually inspected by his supervisor, and then reworked at the Kittanning plant before being shipped to a complaining customer. This problem, if indeed it was a problem, was never brought to McKinney's attention while he was an employee. I conclude from this sequence of events, as well as from the background against which they unfolded, that the Respondent's asserted reason for discharging McKinney was yet another pretext to cover up the fact that it was removing him from its payroll because of his union sentiments and activities. As such, both the discharge of McKinney and the layoff which preceded it violated Section 8(a)(1) and (3) of the Act.

(c) *Gerald Cousins*. Cousins came to work for the Respondent in August 1988, at the Renfrew plant. During his hiring-in interview he was asked by Rice how he felt about unions. Having just been discharged from the Navy and without previous work experience in the private sector, he said he had no opinion. Cousins signed a union card on December 21 and attended union meetings on January 7 and 11. Following Rice's speech to Renfrew employees, Cousins disclosed to Cotton that he had signed a letter to be sent to Rice indicating that he was a union supporter. This document, dated January 11, is in evidence. At that time, Cotton told Cousins that he had nothing to worry about because Rice liked his work. Cotton was wrong. The next day Cotton called Cousins into his office and fired him for unsatisfactory completion of his probationary period and specifically for taking too many days off. Cotton's abrupt aboutface upon learning of Cousins' union affiliation renders meaningless the asserted reason given to justify this action. Cousins' attend-

ance record was as well known to Cotton the day before, when he told Cousins he had nothing to worry about, as it was the day he discharged Cousins. Accordingly, I conclude that the Respondent discharged Gerald Cousins because of his union sympathies and affiliation in violation of Section 8(a)(1) and (3) of the Act.

(d) *Gary Bowser*. Bowser was employed at the Renfrew plant as a glass cutter. During his job interview with Rice in February 1988, the latter told Bowser that, if the word ''union'' was ever mentioned at the plant, Bowser would be out the door. Bowser signed a union card on December 29 and attended the January 7 and 11 union meetings. Bowser also solicited a few cards from employees. Bowser admitted to Sutorka that he favored the Union but he did not specifically reveal that he had signed a card. The day after he had this conversation Sutorka fired him. He told Bowser that he was firing him for soliciting union cards and campaigning for a union on company time and property. Bowser denied doing any of these things on company time or property and asked Sutorka if he had a witness to back up his allegation. Sutorka said that he did, but he refused to reveal the identity of the witness.

In this instance the Respondent discharged an employee assertedly for union activities that went beyond the bounds of permissible campaigning. As noted previously, the Company had no valid no-solicitation rule. Indeed, it did not have a no-solicitation rule of any kind, so when Bowser was discharged, he was discharged not only for violating a nonexistent rule but for violating an asserted rule that was so broad that the Respondent was not at liberty to act upon it. Accordingly, the discharge violated Section 8(a)(1) and (3) of the Act.

(e) *James A. Wright*. Wright was a flat glass cutter at the Kittanning plant. During a job interview in August 1988, he was told by Sutorka that, if he had anything to do with unions, the Company would get rid of him. Wright signed a card on December 29 and later attended one or more union meetings, including the one which Cook, Steffi, and Samosky spied on. He also solicited cards at the Kittanning plant. On January 13, Wright was discharged by Sutorka, who accused him of violating company rules by campaigning for a union on company time and for making threats. Later, the Respondent changed the latter allegation to the making of ''terroristic threats.'' Sutorka refused to be specific about these matters in talking with Wright at the terminal interview.

It came to light at the hearing in this case that the ''terroristic threat'' upon which Sutorka relied was ostensibly a report from employee Dennis Plaisted that Bowser had threatened to damage Plaisted's car. However, Plaisted testified that Bowser had uttered no such threat at all. He recalled a statement which Bowser made in the presence of several employees that the Union would ''get'' employees who refused to sign cards but described this statement as ''blowing smoke.'' Accordingly, the unlawful or unprotected union activity which formed the basis upon which Wright was discharged was wholly unsubstantiated and pretextual. The discharge violated Section 8(a)(1) and (3) of the Act.

(f) *Charles Colton*. Colton was a laminator in the flat glass section at Kittanning. He was hired in the summer of 1988, laid off on January 20, 1989, and obtained another job about 3 weeks after the layoff. He was never recalled to work by the Respondent. Colton attended the union meetings of January 7 and 11 and signed a card on January 11.[21] Rice asked him in the course of a private conversation whether there was anything wrong with the Company and whether there was anything Rice could do to improve things. Colton replied in the negative. He also told Rice that he was going to a union meeting. When Rice asked why, Colton simply replied that he wanted to get both sides of the story.

Rice was laid off without warning on January 20, ostensibly because of lack of work; however, the Respondent hired another employee within 5 days following the layoff instead of recalling Colton. Moreover, there were several employees junior to Colton who remained on the payroll at the time of his layoff. Respondent has taken two positions with respect to its practice regarding seniority. It presented evidence to the effect that, in making layoffs, it does not follow seniority. On the other hand, it also presented evidence that it does in fact follow seniority with respect to people of equal skill. Since most of the members of the bargaining unit are employees of short duration who are paid at rates suggesting that they are for the most part unskilled, it is difficult to see why seniority, under this standard, is not a universal practice at both plants. No evidence was adduced to indicate why employees with less seniority than Colton were retained while he was laid off. In light of these factors, as well as the pervading factor of animus discussed above, I conclude that Colton was discharged because of his union sympathies and activities in violation of Section 8(a)(1) and (3) of the Act.

(g) *John Baker*. Baker is a laminator in the flat glass section of the Kittanning plant. In late December 1988, he passed out several union cards at the Kittanning plant to other employees and signed a card on December 29. On the following day he was laid off along with seven other employees, all of whom received identical letters, which read:

> It is very unfortunate at this time that Custom Glass Corporation must announce a short term layoff for a few employees. We are experiencing an annual decline in orders. We expect this to be only for approximately 2–3 weeks. All laid off employees will be given top consideration for recall.

The letter, dated December 30, was signed by George Sutorka as vice president for Operations. By this time a majority of the authorization cards submitted by the Union in this case had been obtained from card signers.

The General Counsel does not challenge the Respondent's contention that the layoff, as such, was economically motivated. He does contend that the inclusion of Baker among the eight who received layoff notices was discriminatorily motivated. In support of this contention, the General Counsel notes that Mohney and Morgan, two junior employees, were recalled early in January while Baker was left in layoff status until late March, during which time an unfair labor practice charge had been filed on his behalf.

While Baker's case is not as strong as the other discriminatory discharges found herein, Custom Bent Glass is not a Respondent who deserves the benefit of any doubt. It not only threatened to discharge union supporters; it was also

[21] Colton's card bears the date January 11, 1988, but Colton testified that the year ''88'' was placed on the card in error. It should have read ''89.''

prompt to fire 5 active proponents within a span of 48 hours following the Union's first notification letter, justifying its actions by pretexts which were transparently false. By the time the December 30 layoff had taken place, the Union drive was well under way. Baker was an active part of it, having distributed cards to five or six Kittanning employees at the plant. An employer who resorted to spying on the union activities of its employees and who made a public profession of its practice and policy of finding out how each of its employees stood on the question of unionization could not have missed the fact that Baker was soliciting cards at the Kittanning plant during late December. Accordingly, I conclude that Baker was included among the eight laid off employees on December 30 for discriminatory reasons and that his layoff violated Section 8(a)(1) and (3) of the Act.[22]

(h) *Fred Pagliari*. Pagliari was hired in September 1988, and employed by Saxonburg with the title of manager. His nominal supervisor was Saxonburg President John Rice. For this job Pagliari was paid $6 an hour. The Respondent contends that, as a managerial employee, Pagliari does not enjoy the protections of the Act and that the portion of the complaint herein relating to his discharge on January 17 should be dismissed. The Charging Party agrees with this contention.[23] The Respondent further contends that Pagliari was discharged for absenteeism and for poor recordkeeping.

As noted above, Saxonburg was established to make discount purchases of items used in glassmaking from manufacturers who would not sell at such prices directly to another manufacturer, such as Custom Bent Glass. Saxonburg then resold to Custom Bent Glass, through bookkeeping entries and intercorporate payments, any items it purchased at discount. Saxonburg also purchased janitorial supplies. Any items that Custom Bent Glass did not require immediately were sold by Saxonburg to outside customers at markups established by John Rice. These markups could be revised, to a limited degree, by Pagliari. Saxonburg's inventory and operations were conducted in a portion of the Renfrew plant that had a separate entrance from the Custom Bent Glass entrance. Pagliari kept books and inventory accounts, made bank deposits, drove a pickup truck, and made deliveries to Saxonburg's outside customers. He performed small incidental chores for Custom Bent Glass, such as tabulating timecards of Renfrew employees and running errands back and forth between Kittanning and Renfrew. The jobs performed by Pagliari were unskilled or semiskilled, and for his services he was modestly paid. It has not been argued that he was a supervisor within the meaning of the Act because he had no one to supervise. He also had no one and nothing to manage. The same functions were performed by Rick Moses, his replacement, who was hired on October 24, 1988. Moses worked, for the most part for Cotton, as a Custom Bent Glass employee doing clerical work until early January, when he was told he was being trained in the Saxonburg operation to replace Pagliari, apparently without Pagliari's knowledge. I conclude that both Pagliari and Moses were, and are, employees within the meaning of Section 2(3) of the Act and entitled to the benefits and protections of the Act. It does not follow from this conclusion that Pagliari and Moses were, or are, members of the same collective-bargaining unit as the production and maintenance workers of Custom Bent Glass.

Pagliari signed an authorization card that had been presented to him by McKinney on December 21. There is no evidence that he engaged in any other union activities. About a month later he was discharged for absenteeism and for failing to maintain proper records. While there is suspicion that Pagliari may have been discharged and replaced because of his union activities, this suspicion does not rise above the level of suspicion that might be attached to any adverse personnel action experienced by any union adherent in the Respondent's plants during this period of time. It does not amount to a prima facie case. Accordingly, I will recommend that so much of the amended consolidated complaint which alleges that Fred Pagliari was discharged for engaging in union activities be dismissed.

3. The Union's majority status

(a) The General Counsel alleges that all full-time and regular part-time production and maintenance employees employed at the Renfrew and Kittanning plants, with the usual exclusions, constitute a unit appropriate for collective bargaining. While the Respondent sharply contests the unit placement of several individuals, it has not seriously contested the unit description and has not provided any alternative description that it believes to be more appropriate. Since the description found in paragraph 22 of the amended consolidated complaint is a conventional collective-bargaining unit, I find that it is appropriate in this case.

(b) The General Counsel, the Charging Party, and the Respondent entered into a stipulation of fact found on pages 16 and 17 of the Transcript in which they agreed that some 41-named individuals were on the Respondent's payroll on January 12 and 13, 1989, and should be properly included in any determination of the Union's majority status. The name of a 42nd individual, Rick Moses, was conditionally agreed to, depending upon whether Fred Pagliari, a disputed card signer, should ultimately be included. The parties further stipulated that an additional 25 individuals, whose names are recited on page 19 of the Transcript, are persons whose eligibility on the dates in question is in dispute and that *no other people* should be included on any eligibility list other than the agreed upon 41 employees and some or all of the other 25 (plus Moses). Certain arguments made by the parties in their briefs are inconsistent with these stipulations and some findings by me may arguably be inconsistent with the stipulations of inclusion or exclusion. However, I will not look beyond or behind these stipulations in determining eligibility, and I will not permit any party to renege on their stipulations now that the record is closed.

[22] While the Respondent placed evidence in the record suggesting a downturn in sales during December 1988, it never explained how this temporary decline translated itself into eight layoffs rather than some lesser figure. Three months later, it began a hiring program which put 16 new employees on its payroll within a space of 60 days.

[23] The General Counsel, whose responsibility it is to prosecute this consolidated amended complaint, does not concede that Pagliari was a managerial employee and contends that Pagliari's discharge violated the Act. According to the Charging Party, both Pagliari and his replacement, Rick Moses, were managers and, as such, their names should not be included in any eligibility list used to determine the Union's majority status. The Charging Party is thus forced to concede that the union authorization card which Pagliari signed on December 21, 1988, should not be counted toward establishing the Union's majority status. While I agree with the resulting effect of the Charging Party's position, I do so for different reasons which are discussed above and in other parts of this decision.

(1) I have already found that Six, McKinney, G. Bowser, Cousins, and Wright were discharged in violation of Section 8(a)(1) and (3) of the Act.[24] All of their names were necessarily found on the payroll period ending January 12. G. Bowser, Cousins, and Wright were discharged on January 13, so their names were necessarily on the payroll for the period ending January 19. Apart from these considerations, since they were wrongfully removed from the payroll by the unlawful acts of the Respondent, their names should and will be included in the eligibility list and their cards will be counted toward the Union's majority status, unless those cards should be deemed invalid for some other reason. *John Kinkel & Son*, 157 NLRB 744 (1967); *Brunswick Meat Packers*, 164 NLRB 887 (1977); and *Wisconsin Bearing Co*., 193 NLRB 249 (1966).

(2) Neither Pagliari nor Moses, the trainee who took his place, did any production or maintenance work for Custom Bent Glass. They bought and sold items for Saxonburg and did the paperwork and delivery work associated with that activity. The name of Rick Moses was not on the production and maintenance payroll submitted by the Respondent for January 12, 1989, but was listed on a separate payroll, which Rice referred to as ''overhead.'' I conclude that neither of these individuals had a community of interest with the production and maintenance employees of Custom Bent Glass, so their names should be excluded from any eligibility list prepared for that bargaining unit. As a result, Pagliari's authorization card cannot be used in any determination of majority status.

(c) Among the Respondent's production unit[25] of approximately 50 individuals there are 18 people whom the Respondent has indiscriminately labeled as group leaders. Supposedly the term ''group leader'' designates a working individual who is the head of a team that is assigned to perform a recurring task. The inclusion of all of these individuals in the bargaining unit would mean that, in January 1989, the Respondent had only three operating supervisors—Cook, Steffi, and Colton—to oversee nearly 50 employees working in two plants on two or more shifts. Such a ratio of supervisors to rank-and-file employees is plainly absurd, especially in light of the multishift and separate plant considerations involved here.

A designation as group leader does not entitle a leader to any additional pay. Some nonleaders who were given this title were given no additional compensation until the entire plant was reevaluated for pay purposes during the next calendar quarter. There are group leaders who have groups that contain 8, 10, or more employees. Other groups have only one or two members. These groups fluctuate both in number and in composition. Some members of a group may have an hourly rate that is higher than their group leader because the group member has longer service with the Respondent than his leader. Former employee Colton, who worked at the plant between August 1988 and January 1989, testified that he had never heard of the title ''group leader'' during his employment with the Respondent. Samosky, a comparatively long-term employee and one whom the Respondent designated as a group leader, testified that the term is not actually used at the plant in the course of normal conversation or in the course of its operations. He had never seen the term in writing on any company document and regarded the designation as simply one that was taken for granted as applying to certain employees in the plant who head a department and accept the responsibility for keeping that department running. I regard the term ''group leader'' as one which the Respondent coined for purposes of this litigation. The Respondent argues that all group leaders are rank-and-file employees who are part of the bargaining unit and whose names should be included on any eligibility list used to determine the Union's majority status. The other parties acknowledge that some employees whom the Respondent has designated as group leaders are properly a part of the bargaining unit but insist that others should be excluded as supervisors. I have concluded that this label has little or no bearing on the supervisory issues in this case and will give it little or no weight in making such analyses. The term certainly does not describe a single class of persons who should all be treated alike for eligibility purposes.

Another factor came to light during the course of the hearing that bears upon individual determinations of supervisory status. The Respondent provides all employees, both supervisory and nonsupervisory alike, uniform shirts to be worn at the plant. These shirts are the property of a rental company; they bear the company name and the name of the employee to whom they are provided sewn on a label over the pocket. Uniform shirts are either white or brown. Supervisors such as Cook, Steffi, and Cotton wear white shirts; rank-and-file employees wear brown shirts (sometimes referred to as tan shirts). Some so-called group leaders wear white shirts and others wear brown shirts. While Rice and other witnesses fudged and hedged in their testimony when asked about the distinction between a white shirt and a brown shirt, Sutorka and other company witnesses admitted, when pressed, that the color scheme was designed to designate authority on the part of those few who were given white shirts to wear. I conclude that a white uniform shirt was and is an indicia of supervisory authority, perhaps not a conclusive or categorical one but a demonstration to all employees that the Respondent was and is holding out the individual wearing it is an individual who possesses authority that others do not. It does not follow from this conclusion that all brown-shirted employees are not supervisors, since other factors establishing supervisory authority may exist in specific cases, which would place them in that category, notwithstanding their lack of sartorial eminence.[26] The following employees or former employees, except for Ron George, should be excluded from the bargaining unit on the critical date.

(1) *Jerry Samosky*. Samosky is styled by the Respondent as a group leader in the shipping and receiving department

[24] The same finding was made with respect to Baker. However, his name appears among the 41 employees whom all parties agreed should be included on an eligibility list for purposes of determining majority status. Since discriminatee Colton was on the payroll on January 12 and 13, his name also appears among the 41 eligible employees contained in the stipulation, regardless of whether or not his discharge is deemed to be unlawful.

[25] The January 19 payroll contained 49 names. This number does not include the six names on a separate payroll sheet which Rice referred to as ''overhead.'' Notwithstanding the fact that the production and maintenance payroll had only 49 names, the Respondent is arguing in this case that the appropriate collective-bargaining unit included 68 members.

[26] In the course of the hearing it came to light that Nicholas W. Valerio wore a white uniform shirt. In January 1989, Valerio was a working group leader at the Renfrew plant who, from time to time, had two or three employees in his group. The parties stipulated at the hearing that Valerio was properly a member of the bargaining unit, so I will not look behind this stipulation.

at Kittanning. His hourly rate is $6.25 an hour, which is approximately 75 cents to $1 more than other members of his group receive. Samosky wears a white shirt. The shipping and receiving department crates glass and loads it on to trucks. Samosky spends a great deal of time performing these functions with other members of the shipping and receiving department. However, he has a desk in the same enclosed area where Cook maintains his desk. Samosky does not hire, fire, or discipline employees, although he does direct them in the performance of their duties and makes assignments to particular employees based upon his assessment of their abilities. When his department works overtime, he selects the individual to whom overtime is offered. He has occasionally excused employees so they may leave the plant for reasons of illness or for legitimate reasons. Cook testified that, in January, he had some 27 employees under his supervision. This number included Samosky and the shipping and receiving department if Samosky is not deemed to be a supervisor. This ratio clearly suggests that there were one or more other individuals among this group who were also supervisors within the meaning of the Act. Based on these factors, I conclude that Samosky was and is a supervisor within the meaning of the Act.

It should also be noted that Samosky, along with Sutorka, engaged in surveillance of Shinn's distribution of union literature in front of the plant, participated with Cook and Steffi in spying upon a union meeting, and obtained information from Claypoole which Sutorka requested concerning whether Claypoole had signed a union card. Such activities undertaken on behalf of the Respondent constitute Samosky as its agent for the purpose of dealing with union-related activities of employees. They establish a conflict of interest between Samosky and members of the bargaining unit, which would render him ineligible to be a part of the bargaining unit, regardless of his supervisory status.

(2) *Scott Geibel*. Geibel has worked for the Respondent for about 4 years and is now a group leader at the kiln in Kittanning. For most of his career with the Respondent he worked at Renfrew. He receives $7 an hour, a rate considerably above the scale earned by the rank-and-file employees, including the other kiln workers. Geibel does not hire, fire, or discipline; however, he does evaluate new employees and reports to higher management their suitability for employment. Geibel wears a white shirt whenever he wears a company uniform, but he testified that he often wears his own clothing to work because of the temperature near the kiln. Geibel is empowered to obtain the services of employees outside his immediate group who work elsewhere in the plant if his group should require their services on a short-term basis. In January, Geibel worked at the Renfrew plant. Before that time, he and Cotton were the only persons at Renfrew who wore white shirts. Geibel normally arrived at the Renfrew plant an hour before any management employees did, ostensibly to assist with daily startup operations. During that period of time he was the highest ranking company official on the premises. I conclude from these factors that Geibel is a supervisor within the meaning of the Act and not a member of the bargaining unit.

(3) *Thomas Higgins*. Higgins has worked for the Respondent for about 4 years, first at Renfrew and later at Kittanning. He earns $7.75 an hour, an amount that far exceeds the pay rate of both Geibel and Samosky, as well as most, if not all, rank-and-file employees at both plants. Higgins wears a white uniform shirt. He is a skilled pattern maker and has been employed at that task at both plants. He does not hire, fire, or discipline employees, nor does he evaluate their individual performances. He was a group leader at Renfrew on the midnight shift and is now a group leader on the day shift at Kittanning, having 2–4 employees in his group. When he worked the midnight shift at Renfrew, he was the highest ranking person at that plant during those hours. I conclude that Higgins is a supervisor within the meaning of the Act and not a part of the Respondent's bargaining unit.

(4) *Alfred M. Ferrari*. Ferrari has worked for the Respondent at Renfrew for about 4 years and has been the leader of a group that includes two or three other people. He earns $6.20 an hour, a considerably higher rate than the other members of his group. Ferrari wears a brown uniform shirt. Like most group leaders, he spends most of his time in production work. During the midnight shift, Ferrari is now the highest ranking employee at the Renfrew plant and is responsible for the safety of the plant. While he normally does not do so, he has granted excused absences to employees on the night shift for legitimate reasons. On occasion, he has called employees to work to fill in for absentees and was told that he had authority to do so. However, he usually checks with Rice to see if the job being processed is of such an emergency nature that it has to be completed immediately. I conclude that Ferrari is a supervisor within the meaning of the Act and is not a part of the Respondent's bargaining unit.

(5) *Dennis Plaisted*. Plaisted was hired in September 1987 and performed a variety of jobs until his layoff in June 1989. Plaisted holds a bachelor's degree in business administration and was paid $5.50 an hour. He had a desk in the enclosed office also occupied by Cook. His name appeared on the ''overhead'' or office payroll, which the Respondent submitted into evidence. Plaisted spent about 25 percent of his time on the production floor labelling crates and preparing packages for shipment through UPS. The rest of his time was spent in clerical work and in running errands, e.g., picking up mail, serving as intraplant courier, making daily bank deposits, or in doing accounting. Rice designated Plaisted as personnel manager in the spring of 1989. In that capacity, he sent out correspondence to employees over his own signature calling himself personnel manager.[27] I conclude that Plaisted was not a production or maintenance employee but a managerial employee and, at some phase of his career, a supervisor within the meaning of the Act. As such, he was never a member of the bargaining unit.

(6) *John A. Howryla*. Howryla came to work for the Respondent in February 1988. He has a bachelor's degree in engineering and does quality control work. He was initially paid $7.50 an hour but his compensation was converted into a salary of approximately $22,000 in June 1989 when the Respondent hired another engineer in a salaried position and sought to employ both men on an equivalent basis. In January 1989, his name was listed on the Respondent's office or ''overhead'' payroll.

[27] I discredit Rice's testimony that he did not authorize Plaisted to sign letters as personnel manager and that such correspondence was just a mistake on Plaisted's part. This was one of several instances in which Rice tried to explain away entries on company records which flatly contradicted his theory of the case by labelling such entries as ''mistakes.''

Howryla reported directly to Rice. He has a desk in an office in the Kittanning plant, which he shares with Steffi, an admitted supervisor. However, he works from time to time at Renfrew and has some limited discretion as to whether to report to the Kittanning or the Renfrew plant on any particular day. On one occasion, Howryla supervised the operation of the Renfrew plant for a day when Plant Manager Cotton was absent. Howryla does not punch a timeclock but signs an attendance sheet that he submits to Rice. He wears a white uniform shirt indicating supervisory authority. As a quality control inspector, Howryla inspects glass, checking it against industry, customer, and company specifications. He can reject any item that does not meet these specifications. He cuts glass on occasion but this is an incidental part of his duties. He compiles kiln records and checks paperwork submitted by various group leaders. On one occasion, he was asked to investigate McKinney's work as part of the investigation that led to McKinney's discharge. It is clear that Howryla has no community of interest with production and maintenance employees and is a supervisor within the meaning of the Act. As such, he is not a part of the Respondent's bargaining unit.

(7) *The December 30, 1988 layoffs*. As noted previously, the Respondent laid off eight employees on December 30, 1988. The parties have agreed that two of these employees, Baker and Dean Crawford, both of whom were recalled in March, should be included in the bargaining unit. They also agreed that Morgan and Mohney, both of whom were recalled on January 9, 1989, should be included. I will not look behind these stipulations. The Respondent contends that the other four who were laid off on this occasion should also be included in the unit. I disagree.

None of the four December 30 layoffs whose inclusion is at issue was on the payroll for the periods ending January 12 or 19. Eligibility determinations are normally made by reference to the payroll for the week that includes the election or, in this case, the designated date for determination of majority status. In this case, the dates in question are January 12 or 13. Because the names of these four individuals—Rearick, Whitehair, Sheehan, and Shields—were not on the relevant payrolls, the Respondent shoulders the burden of establishing why they should be included in the unit for purposes of determining the Union's majority status. The letter given to each of these employees on December 30 recited that the layoff was ''short term'' and was occasioned by a decline in orders. It further stated that the Respondent anticipated that the layoff would be for only 2 or 3 weeks and that all laid-off employees would ''be given top consideration for recall.''

As discussed, supra, the Respondent has an ambivalent policy respecting seniority. Telling employees that they would be given ''top consideration'' for recall does not guarantee them anything in terms of recall. Moreover, when Sutorka spoke with each employee at the time of the layoff, his verbal message was by no means as sanguine as the statement in the letters they received. Sutorka told them that ''hopefully'' the layoff was not permanent and that they would be recalled ''if orders picked up.'' When Baker asked Sutorka how long he would be laid off, Sutorka said maybe two or three weeks but that there was no guarantee. Sutorka testified at the hearing that he really did not know on December 30 how long the layoff would last. Rice testified that he thought that the prospects for future employment contained in the letter which Sutorka had given to the eight employees on December 30 was overly optimistic as far as date of recall was concerned. Morgan and Mohney were recalled on or about January 9. Crawford and Baker were recalled in March. Rearick came back in July, Shields and Sheehan never returned, and Whitehair returned in July after he had been laid off another job.

The Respondent asserts that Rearick, Whitehair, Shields, and Sheehan should be included in the unit as it should be constituted on January 12 or 13, 1989, because, on those dates, they had a reasonable expectancy of recall in the near future, a test the Board has used in such cases as *Atlas Metal Spinning Co*., 266 NLRB 180 (1983), and *Weather Vane Outwear Corp*., 233 NLRB 414 (1977). This test is applied within a timeframe of the election, or, in this case, the date on which majority status is to be determined. *Tomadur, Inc*., 196 NLRB 706 (1972). However, evidence of events following the date of the election (or determination of majority status) is certainly relevant in revealing the situation which existed as of the critical date. While the totality of the evidence in this case is unclear as to when, if ever, these employees might actually be recalled, an additional factor emerges from record evidence that adds another factor to an evaluation of their status, namely a clear indication that each of these four employees had abandoned their employment with the Respondent following the December 30 layoff and, having done so, demonstrated that they had no continued interest in the terms and conditions of employment at the Respondent's plants. Accordingly, they should be excluded from the bargaining unit because they had constructively quit their jobs.

Whitehair was hired by the Respondent as a kiln worker in September 1988, and had been employed about 3-1/2 months at the time of the layoff. Sheehan and Shields had been employed less than a month when they were laid off. Sheehan and Shields were classified as general laborers. Between the layoff and July 1989, there has been no communication between the Respondent and any of these employees. Sheehan and Shields lived in the same boarding house in Ford City, Pennsylvania, a suburb of Kittanning. Rice asserts that, late in January, an effort was made to contact both of them but they had moved and had left no forwarding addresses. Neither ever made any effort to contact the Respondent to inquire about the availability of employment and no further effort was made by the Respondent to contact them. Rice testified that he thought Sheehan was in West Virginia and did not know how to get in contact with him. He also thought that Shields had returned to West Virginia. In January he had reportedly left word with their landlord asking them to get in touch with the Company, but neither has ever done so. Both obviously abandoned what was for them short term employment and should not be considered part of the bargaining unit.

Rice testified that he knew of no effort on the part of the Respondent to contact Whitehair and had heard that Whitehair was working in Oakmont, a city in the general vicinity of Kittanning. Whitehair apparently returned to the Respondent's payroll while the hearing in this case was in progress. Later in the proceeding, Whitehair took the stand and testified that, despite the fact that he had maintained the same post office box during his absence from the plant, no attempt had been made by the Respondent that he was aware

of to contact him between December 1988 and July 1989. During that interim, Whitehair had worked for Kelly Tree Service, a job which he characterized as temporary, and then for two other employers. After he had been laid off by his most recent employer, Sink Sales and Rental Company, he came to the company office and asked Rice if he had any jobs. Rice rehired him. This sequence of events demonstrates that, when he was laid off, Whitehair abandoned his employment and sought work elsewhere. He did not return to the Respondent's plant until he had tried several other jobs that did not work out. When Whitehair returned in July, his return could only be characterized as the rehiring of an employee who had constructively quit. Accordingly, I would not include him in the bargaining unit in January 1989.

Rearick was hired in September 1988 as a maintenance man and was also laid off on December 30. On February 6, he moved from the residence he had occupied while working for the Respondent and also discontinued his telephone service. Rearick did not work from December 30 until his return to the Kittanning plant in July while the hearing in this case was in progress. During this period of time he had regained custody of his children, so he simply wanted to stay home and spend some time with them. In July, he came back to the plant, told Rice he was ready to go to work, and was rehired the following day. Rearick's absence from the Respondent's payroll in January and for several months thereafter was not the result of layoff but because of a choice he had made not to work. As such, he constructively quit his job and was later rehired after he felt that he had spent enough time at home and was ready once again to go to work. Accordingly, he should not be included in the bargaining unit as of January 1989.

(8) *Tim Singer*. Tim Singer was hired in December 1987, as a maintenance man and left the Respondent's employment in December 1988. He was not on the payroll on the determinative dates in this case nor has he been regularly employed by the Respondent since that time. Respondent argues that he should be included in the bargaining unit because he was on a leave of absence. Respondent opposed Tim Singer's application for unemployment compensation on the basis that he had quit his job. In a letter to the Pennsylvania Office of Employment Security, dated February 14, 1989, Respondent's assistant administrative manager, Brian J. Davis, told Pennsylvania authorities that Timmy L. Singer had ''voluntarily quit his job at Custom Bent Glass Company on December 28, 1988, for another job. Timmy understands that he can return to work whenever he desires, but he chooses not to come to work. Also, he still owes the Company money from an advance.'' Sometime in the spring of that year, Timmy Singer paid off his outstanding debt to the Respondent by working several Saturdays but this has been the extent of his connection with the Respondent since December 28. The Respondent is not at liberty to avoid paying unemployment compensation by asserting to a public agency that an employee has quit his job and then to achieve some benefit in a Board proceeding by claiming that its letter to the unemployment office was wrong and that the employee in question was simply given a leave of absence to attend to family problems. Even granting Rice's false and groundless factual premise that Singer was on a leave of absence, the so-called leave of absence was not scheduled to end at any time in the forseeable future and had not come to an end many months later when the record in this case closed. Accordingly, I will exclude Timmy Rice from the bargaining unit on the critical dates involved in this case.

(9) *Tom Singer*. Tom Singer, the brother of Tim Singer, was a kiln worker who was hired in April 1988. According to a document entitled ''Work History for the Period Between December 5, 1988 and April 1, 1989,'' prepared by the Respondent and submitted in evidence. Tom Singer was laid off on December 8, 1988, and has not worked for the Respondent since that date. The notice posted at the Renfrew plant by Cotton stated that the layoffs being made were ''indefinite.'' There is no evidence in the record that he was ever told if or when he might ever return to work. Rice testified that the layoff was for lack of work. Tom Singer's name does not appear on the payroll for either of the critical dates in this case. The Respondent has been unable to reach Tom Singer and does not know where he is located. His sister, Carol Lynn Singer, is an employee at the plant. Apparently she told Rice that both Tom and Tim Singer had left the Kittanning area and she was unaware of their location. Their mother apparently reported that they had left Pennsylvania and was in Tennessee or Mississippi. Rice testified that he was interested in locating the Singers because they had not turned in their uniforms and the uniform company was continuing to charge the Company for them.

It is not apparent from the record or from the brief why the Respondent thinks that Tom Singer should be included in the bargaining unit. There is nothing in the record to indicate whether Tom Singer was told, at the time of the layoff, when, if ever, he might be called back to work and there is nothing in the Respondent's employment history from which any such facts could be inferred. The fact that there has been no communication between the Respondent and Tom Singer, as well as his departure from the state and his refusal over a period of many months to respond to requests to contact the Respondent, make it abundantly clear that he abandoned his employment with the Respondent and should be treated as a constructive quit. Accordingly, I will exclude him from the bargaining unit.

(10) *Robert Hiles*. Hiles was employed in September 1988, as a glass cutter at the Renfrew plant. During his employment with the Respondent he had some serious domestic problems, which resulted in an arrest for criminal trespass. Hiles was absent from the Respondent's payroll from December 8, 1988, until January 25, 1989. He was thereafter laid off and recalled to work. Respondent has a rule that, if a probationary employee misses three consecutive days of work without an excuse, he is automaticaly terminated. On December 8, Hiles received a certified letter from Brian Davis, who was handling personnel matters for the Respondent at that time, which stated:

> Effective this date, your employment with Custom Bent Glass Co., Inc. has been terminated. Our reason for taking this action is because you missed 3 consecutive days and are still a probationary employee.
>
> If you desire consideration for re-employment, you must submit an application for employment.

On its face, this letter would appear to be conclusive proof that Hiles had been severed completely from the Respondent's work force on December 8 and that his reappearance

on the payroll on January 25 was as a result of being rehired or re-employed. Accordingly, he would not have been part of the bargaining unit on the critical dates which occurred during his absence.

As with other efforts at unit packing, the Respondent claims that its own records pertaining to Hiles were in error and should be ignored, arguing that the eligibility of Hiles should be determined instead on the basis of self-serving testimony, which contradicts a contemporaneous letter effectuating the discharge. According to Hiles, he told Rice that he needed a leave of absence to take care of some domestic problems and Rice had granted that leave. When he received the discharge letter, he brought it to Rice's attention and Rice informed him to ignore the letter because it was a mistake on the part of Davis, the company official who sent the letter. During the interim during which he assertedly could not work because he had to devote his full time and attention to his domestic problems, Hiles took a job as a security guard during the Christmas holidays, but intended that it would only be temporary measure until he could be recalled to work by the Respondent.

Even if one should credit the testimony of Rice and Hiles on this point—and I do not—there is no indication of how long the leave of absence which the Respondent assertedly granted to Hiles on December 8 was scheduled to last and when, if ever, Hiles would return to the Respondent's payroll. On that premise alone, Hiles should not be included on the eligibility list on the critical date. However, the company record pertaining to Hiles is a far more reliable indicator of Hiles' status during this period of time than the testimony of either witness. Accordingly, I will exclude Hiles from the bargaining unit on the basis that he had been discharged for excessive absenteeism.

(11) *Leroy Snow*. Snow was hired as a crater/packer in December 1987 and worked until May 1988. At that time, Snow went on what he referred to as ''medical leave'' because of a hereditary problem relating to his ankle which prevented him from doing hard physical labor because of excessive pain. In conjunction with the advice of his doctors, Snow elected to undergo physical therapy rather than surgery. He told Rice that he was leaving and made no statement concerning any intention to return to the Respondent's work force. Rice told him to do what he had to do and stated further that, if Snow ever wanted to return to work, he could do so. Snow left on or about May 31, 1988.

In August 1988, Snow phoned Rice and informed him that he was entering Butler County Community College as a full-time matriculated student to study accounting. Rice repeated to Snow that, if he ever wanted to come back to work, he could. Snow began a full-time course of studies at that time and continued throughout the ensuing school year. He is still enrolled. Snow also continued to take physical therapy for his ankle until December 1988. He was not on the Respondent's payroll in January 1989, nor within 6 months of that date, either before or after.

On or about June 15, 1989, Snow went to the Kittanning plant and asked Rice for summer employment. He was hired in mid-June under the clear understanding that he would leave in mid-August to return to school. In fact, he did so and did not tell the Respondent that he had any intention of returning to work after the end of his summer employment.

It is clear from this set of facts that Snow was not on leave of absence, either temporary or indefinite, on the critical dates in January, but that he had quit his job. His phone call to Rice was merely an attempt to ''keep the door open'' should he ever desire to return to work. Snow's status as a full-time student on January 12 and 13 is wholly inconsistent with any contention that he was an employee of the Respondent at that time. The fact that he returned during summer vacation does not mean that he was an eligible employee for collective-bargaining purposes, either then or at any other time.[28] Accordingly, I will exclude Snow from the bargaining unit.

(12) *Don Boyle*. Boyle was hired by the Respondent in August 1988, as a general helper, and worked at Renfrew until December 9, 1988, when he was laid off for lack of work. He has not worked for the Respondent since that time. When Boyle was laid off, he was told that the layoff was indefinite and that the Respondent could not assure him any definite date for his return. The posted notice stated that the layoff was ''indefinite.'' On January 9, 1989, the Respondent wrote Boyle a letter asking him to return the company uniforms which he had in his possession and which he had not returned and for which the Company was being charged by the uniform rental company. Rice testified that he thought Boyle had moved but there is no conclusive evidence in the record on that point. Rice also testified that, at some unstated time, he offered Boyle a job at the Kittanning plant but Boyle, who had transportation problems, said that he would have to wait until there was an opening at Renfrew. The employee complement at the Renfrew plant has declined since Boyle's layoff and apparently no opening has arisen.

It appears from Rice's own testimony that, at the time of the December 9 layoff, Boyle had no hope of returning to work in the near future because of what his Supervisor Cotton was instructed to tell him and because of what the layoff notice stated. Since he was on indefinite layoff on the critical date, he should not be included in the bargaining unit for majority determination purposes.

(13) *Donald Freeman* and *Ron George*. Freeman and George were both off work drawing workmen's compensation on the critical dates. Freeman was hired on October 15, 1987, and worked at the kilns. He was seriously injured on the job on August 5, 1988, while loading a stack of glass into a mould, and has been on workmen's compensation since August 25. His injury was diagnosed as a herniated disc with two protruding discs. Rice acknowledged the seriousness of his injury and the legitimacy of his compensation claim. Testifying in this case on August 8, 1989, Freeman stated that he did not know even then when he might be able to return to work and stated further that he had been advised by his physicians that he might have to seek other employment that did not involve manual labor. In light of these considerations, there was no reasonable expectation on Freeman's part, either in January 1989, or at any other time, that he would return to work for the Respondent in the near future or at any other time. For that reason, he should be excluded from the bargaining unit.

A different situation exists with respect to another employee who was drawing workmen's compensation on the

[28] Students who work during their summer vacations and then return to school in the fall are not eligible voters in Board elections. See *Connecticut Foundry Co.*, 247 NLRB at 1517, and cases cited therein at fn. 5.

critical date whom the Respondent wishes to include in the unit. Ron George was employed by the Respondent in November 1987 as a kiln worker. On July 14, 1988, he suffered a laceration of his left forearm. Both the Respondent and its compensation carrier wanted George to come back to work on limited duty, but George declined to do so until the insurance carrier threatened to cut off his compensation payments. Faced with this prospect, George returned to work on March 21, 1989, and is still employed by the Respondent. Based on these facts, I conclude that, on the critical dates in January 1989, George had a reasonable expectation of employment in the near future and should be included in the bargaining unit.

(14) *Herman Carper*. Carper was hired by the Respondent on December 9, 1989, as an over-the-road truckdriver and worked for the Respondent until August 1989. Carper drove a vehicle owned by the Respondent to deliver glass to such cities as Atlanta, Baltimore, and Boston and to states such as Ohio, Indiana, and Nebraska. For this effort he was paid 18-1/2 cents a mile and was given an expense allowance of $5 per day while on the road. For deliveries in western Pennsylvania, it was more advantageous to Carper to be paid on an hourly basis; he could elect to be paid in this manner for those deliveries. Carper spent most of his working time away from the plant. He was given the opportunity of performing work at the plant in the crating department to make out a full week if there was insufficient delivery work. In those instances, he would be paid $4.50 an hour. During each of the weeks in January he worked less than a full day on an hourly basis and derived almost all of his income from the mileage rate quoted above.

Since *Koester Baking Co*., 136 NLRB 1006 (1962), the Board has routinely excluded over-the-road truckdrivers from production and maintenance bargaining units because such employees are compensated on a different basis than plant workers, spend little or no time at the plant, and have little or no community of interest with plant employees. See *Keystone Pretzel Bakery*, 242 NLRB 492 (1979); *Ideal Laundry & Dry Cleaning Co*., 152 NLRB 1281 (1965), enfd. 372 F.2d 307 (10th Cir. 1967). These factors control the eligibility of Carper and require that he be excluded from the Respondent's production and maintenance bargaining unit.

(15) *Robert Beatty*. Beatty's status at the plant presents a close question of eligibility. He was hired in January 1987 as a crater and packer at the Renfrew plant and is still employed. Beatty is paid $5.50 an hour and normally works a full workweek. Without more, he would be routinely included in the bargaining unit.

However, in addition to his regular work, Beatty reclaims lumber which has been used at the plant for packing. He visits various glass distributors in the Pittsburgh area to whom the Respondent has sold glass, picks up crates in which the Respondent has shipped glass, cleans the crates, and returns them to the plant to be used again for future shipments. To assist in this effort he employs his son and another teenager and performs the cleaning work either at his own home or at the Renfrew plant. When Beatty delivers a load of reconditioned crates, he submits an invoice to the Respondent and it paid between $75 to $125 per load, depending on the size of the load. The General Counsel and the Charging Party argue that Beatty should be excluded from the bargaining unit because a basic conflict of interest exists between him and other members of the bargaining unit because the Respondent is not only his employer, but his customer as well.

I agree with the General Counsel that Beatty's case falls within the holding of the Board and enforced by the Third Circuit in *Alumbaugh Coal Corp*., 247 NLRB 895 (1980), enfd. in pertinent part 635 F.2d 1380 (8th Cir. 1980). Beatty's ongoing business relationship with the Respondent sets him apart from the other employees at the plant who are compensated exclusively by wages and fringe benefits. Beatty is an independent contractor with respect to his lumber reclamation activities and these activities provide him with substantial income. Accordingly, his interests are not wholly aligned with those of other employees, who do not enjoy this business relationship with the Respondent. Accordingly, I will exclude him from the bargaining unit.

(16) *Summary*. In light of the above considerations, the collective-bargaining unit of the Respondent's production and maintenance employees on January 12 and 13, 1989, included 47 members, as follows:

a. The employees named in the stipulation of the parties found in the record	41
b. The discriminatees who were discharged on January 12 and 13, 1989	5
c. Ron George	1
Total	*47*[29]

(d) The General Counsel submitted 28 authorization cards upon which he is relying to establish the Union's majority status on the critical dates. Because Pagliari was found not to be a part of the bargaining unit, I will exclude his card in making any computation. Of the remaining 27 cards, the Respondent objects to the use of 12 because of various irregularities which assertedly attended their execution.

(1) Some of the Respondent's objections relating to missing dates or erroneous dates are patently frivolous and can be disposed of easily. Respondent argues that cards signed by Dean Crawford and Patrick Claypoole should not be counted because those cards bear no date. Claypoole's card is undated but, on the reverse side, bears the time and date stamp of the Board's Pittsburgh office for January 13, meaning that it was submitted to the Board by the Union with the representation petition, which was mailed from its Greensburg office on January 12. Claypoole testified at the hearing without contradiction that he signed his card on January 11 and simply forgot to date it. There is no requirement that authorization cards be dated. The only requirement is that they be signed on or before the date used to determine the Union's majority status. Both the marking on the reverse side of Claypoole's card and his record testimony establish that his card was executed before the critical dates in this case.

Likewise, Crawford's card bears no date on the front side but does bear the January 13 stamp of the Board's Regional Office on the reverse side. Crawford personally identified his card at the hearing and stated that he signed it sometime in

[29] There was argument in the briefs relating to Jay Maycock, a general helper, who quit on January 9, 1989. Maycock was not among the 25 employees whose eligibility the parties agreed was in dispute. As such, he was stipulated to be out of the unit and I will not look behind this stipulation.

December 1988. This testimony, taken together with the Board's time and date stamp, make it clear that the card was executed before the critical dates in this case.

Ronald Smail's card bears the date of September 15, 1988, on the front side and the January 13 stamp of the Board's Regional Office on the reverse side. These facts alone would not invalidate the card since a card executed on September 15 could be used to establish majority status on January 12 or 13 of the following year. The September date is an obvious error since the organizing drive did not begin until November. Smail personally identified his card at the hearing and testified that he had mistakenly written on the card the date he began working for the Respondent, not the date on which he had signed the card. He further testified that he signed the card on January 11, 1989, at the union meeting which took place at the Kittanning firehouse. Such testimony is sufficient to satisfy any captious doubt as to the date on which the card was signed and its availability for use in determining the Union's majority on the critical dates.

The card of Charles A. Colton bears the date of January 11, *1988*. This fact alone would not invalidate its use on January 12, 1989. The card also bears the Board's January 13, 1989, stamp on the reverse side. Colton identified his card personally at the hearing and testified that he signed it on January 11, 1989, stating that placing the date ''1988'' on the card was an accidental error. The Respondent's objection to its use in determining majority status is overruled and the card will be counted for that purpose.

(2) Respondent objects to the use of cards executed by Charles Watts and Donald Montgomery because these employees assertedly did not know what they were doing when they signed authorization cards designating the Charging Party as their bargaining agent. Watts is a maintenance man who signed a card at the Renfrew plant on December 21, 1988. The card had been given to him by McKinney. Montgomery, a former employee who worked at the kilns, signed a card on January 12, 1989, which was given to him by Gary Bowser.

The cards in question were unambiguous and written in simple English. Headed ''Official Membership Application and Authorization,'' the cards stated that the signer was hereby applying for membership in the Union and that he was designating and authorizing the Union to act on his behalf as his collective-bargaining representative. The word ''election'' does not appear on the face of the instrument. There is no contention that Watts, Montgomery, or any other card signer was non compos mentos or that he or she had been adjudicated incompetent by a court and made the ward of a committee or guardian. Accordingly, they should be bound by what they sign, notwithstanding assertions made afterwards that they did not know what they were signing. There is every reason to apply this rule strictly when the instrument in question is, like this one, simple, clear, and direct in its statement and meaning. The fact that these cards can be used as a showing of interest to support the filing of a representation petition and in fact were used for that purpose in no way detracts from statements that appear on their face or from the authorizations conferred by those who have adopted those statements by affixing their signatures. This age-old policy of the law—holding adults to the terms and conditions of documents which they have signed—has found its way into the administration of the Act. The Board has held that the fact that a card signer misunderstands the nature of an authorization card (or says he does) is irrelevant and in no way undermines the validity of the card. *C & T Mfg. Co*., 233 NLRB 1430 (1977). The only question the Board will look to in examining the execution of a card is whether it is the product of coercion, or misrepresentation attributable to the organizer.

Watts testified that he did not have his glasses with him when he signed the card so he did not read the card before he signed it. According to him, McKinney told him that the card was for an election or voting and also said that, if Watts signed the card, there would be an election and he would be protected. According to Watts, McKinney pointed with his finger to the places on the card which Watts was supposed to sign and Watts signed it. The card itself shows that Watts correctly entered the proper information in block print letters after the appropriate indications on the printed form. He did print his name where the form called for signature and he signed his name in cursive writing where it called for his name, but he entered the name of his employer, the date, and his postal box and city of residence in his own handwriting in the proper locations. McKinney testified that Watts in fact did read the card and signed it in his presence. He further testified that he told Watts that the reason for signing the card was to help organize a union and to get Watts actively involved in supporting it. I credit McKinney and discredit Watts, one of several employees who, in the wake of the heavy handed and coercive campaign waged by the Respondent, came to the hearing in this case to ingratiate themselves with an angry employer by repudiating their free act and deed. I will count Watts' card.

Montgomery testified that, in the course of a highly intimidating conversation with Rice in which Rice called him a ''— asshole'' for signing a union card, he told Rice that he thought that the Union had to contact him again before there would be a vote. Montgomery had received this information from a friend who was working in a lumber yard where Montgomery is now employed and who was telling Montgomery about an organizing drive by another union which was then in progress at the lumber yard. A few days after his conversation with Rice, Montgomery obtained one of the card withdrawal forms which the Company had prepared and sent it in to the Union office. A statement assertedly made to Montgomery by an employee of another employer involved in a campaign by another union does not amount to a misrepresentation by *this* union about this *card* in *this* campaign. It does not form the basis for invalidating Montgomery's card nor does Montgomery's partial misunderstanding as to the role of authorization cards in an organizing campaign. I will count Montgomery's card.

(3) The Board has, on occasion, invalidated union authorization cards and refused to count them in making a determination of majority status by invoking its *Cumberland Shoe* rule.[30] According to *Cumberland Shoe*, if a card solicitor misrepresents the purpose of a union authorization card by telling a prospective card signer that the sole purpose of a card is to obtain a representation election, the card may not be used by the General Counsel to support a refusal to bargain allegation in a complaint. The *Cumberland Shoe* rule was given qualified endorsement by the Supreme Court in

[30] 144 NLRB 1268 (1963), enfd. 351 F.2d 917 (6th Cir. 1975).

the *Gissel* case, along with a cautionary statement, certainly applicable to this case, that employees should be bound by the clear language of what they sign and the Board should treat with suspicion the testimony of card signers who seek to relieve themselves of the consequences of their acts by post-signature testimony which is often the product of employer coercion.[31] Moreover, a statement by a card solicitor that a card can or will be used to get an election does not amount to a misrepresentation because, as pointed out above, cards can be used to get a representation election and frequently are used for that purpose. Applying these rules to credited evidence involving the cards of Valerio, Wright, Douglas Kolich, Diane Raimondi, James Shannon, and Dewayne Stevenson, I find that these cards were not the product of misrepresentation under the *Cumberland Shoe* rule and should be counted toward establishing the Union's majority status. The General Counsel's motions to admit the cards of Kolich and Shannon were taken under advisement at the hearing. Those cards are now admitted into evidence.

Kolich is an insulator in the bent laminating department. He was designated a group leader a few weeks before the hearing in this case. On December 29, 1988, he signed a union authorization card at the Kittanning plant which had been given to him by his uncle, Gary Bowser. Kolich admits that he read the card. According to his testimony, someone—possibly Bowser, but he was not sure—told him that it was ''merely [to] hold an election if they got a majority. If they got a certain amount, I think it was thirty percent, they were to hold an election whether or not to bring the union in.'' In his pretrial affidavit, Kolich stated that ''when I signed that card I was told by signing the card that I was requesting that the Union represent the workers at Custom Glass Corporation.'' Kolich then stated on the stand that he could not remember whether he was told ''about the thirty percent, you know, to bring in the vote before or after I signed that. I—that I can't remember. It may have been after, or before, I can't remember.'' When pressed, he stated that he remembered being told that, by signing the card, he was requesting the Union to represent the employees at Custom Glass. Kolich's testimony on this point is wavering, contradictory, and wholly unreliable. For these reasons, and on the basis of his demeanor, I discredit it and will count the card.

James Shannon is an autoclave operator and has worked for the Respondent since October 1987. He signed a card on January 12, 1989, at the plant. According to his testimony, he had ''left word'' with his fellow employees that, if someone wanted to give him a card, it should be placed in his lunch box. Someone put a card in his lunch box. He did not read it but he signed it. He thinks he turned it in to Baker. Shannon further testified that he thought the purpose of the card was just for a vote because that was what everyone was saying; however, he could not identify anyone who had said it to him. In his pretrial affidavit, Shannon stated that ''by signing the card, I was expressing my support for the union presence at Custom Glass Corporation.'' Shannon repudiated his affidavit by saying that he did not read it and signed it at the advice and suggestion of his father. Shannon was interviewed before trial by a Curley, the legal assistant to Respondent's counsel. He testified that it was after speaking with Curley that he decided that he would testify that he had been told that the purpose of the authorization card was to get a vote. He added that he had not been prompted in this regard. Shannon's testimony, taken at face value, does not provide a basis for invalidating his card because he could not identify any union agent as a person who had misrepresented to him its purpose. However, I discredit Shannon's testimony on the basis of demeanor and on the basis of his wavering, contradictory, and inherently unbelievable testimony. Accordingly, I will count his card.

Nicholas W. Valerio is a group leader at the kilns and has been employed by the Respondent for about four years. He signed a card, which is undated, on January 12. The card was given to him by Gary Bowser. According to Valerio, Bowser handed him a card inside the plant and told him that the purpose was just to get a vote. Valerio took the card and kept it throughout most of the workday. He stated that he did not read the card but signed it at a standup desk which is located in the plant near the kiln. He returned the card to Bowser who said that he was going to turn it into the Union. Two or 3 days later, Valerio spoke with Rice about the card. He told Rice that he had signed one but that he did not know what he was doing. Later, Valerio obtained one of the card withdrawal forms that the Respondent had prepared and mailed it into the Union. Bowser testified credibly that he and Valerio rode together to work and that he handed Valerio a card while in his automobile. He denied ever telling Valerio that the only purpose to be served by signing the card was to get an election. Valerio admitted on the stand that his memory was poor. It is also obvious from the facts in the record that it had been massaged by the intimidating conduct of this Respondent. I credit Bowser's denial and I will count Valerio's card.

Diane Raimondi works in the bent laminating department at Kittanning as a flat glass laminator. She has been employed by the Respondent since October 1987. On December 29, 1988, she signed a union authorization card which was given to her at the plant by Colton. She thought that Bowser said that, if the Union collected enough cards, it would bring in a vote. She denied that Colton or Bowser ever told her that the sole purpose of the card was to get a vote but stated that she personally believed that the purpose of signing the card was just to get a vote. She admitted that she read the card. In a pretrial affidavit Miss Raimondi stated that she had been told that, by signing a card, she was applying for membership in the Union, but then she hedged on that statement by claiming that she had come to this conclusion only after re-reading the card at the suggestion of the Board agent who took the affidavit. Raimondi obtained one of the card withdrawal forms which the Respondent had prepared and sent it into the Union's office. I discredit Raimondi's on the basis of her demeanor and on the basis of the uncertainty and implied contradictions in her testimony. Accordingly, I will count her card.

Dewayne Stevenson has worked for the Respondent since February 1986 and at the Kittanning plant since August 1988. He attended the January 11, 1989 union meeting at the Kittanning firehouse and, on that occasion, signed a union

[31] ''We also accept the observation that employees are more likely than not, many months after a card drive and in response to questions of company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of Sec. 8(a)(1). We therefore reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry.'' *Gissel*, supra, 395 U.S. at 608.

card which was given to him by Shinn. Stevenson thinks that Shinn said to him that, if enough cards were signed, there would be an election. He affirmatively testified that Shinn did not say that the sole purpose of a card was to get a vote. The statement which Shinn reportedly made to Stevenson at this meeting does not constitute a misrepresentation so there is no basis for invalidating Stevenson's card. It will be counted.

James A. Wright Jr. is a glass cutter who was employed by the Respondent in August 1988. He signed a card on December 29, 1989, and thinks he gave it to Bowser. He admits reading the card before signing it. Wright testified that, sometime after signing the card, he attended a union meeting during which Shinn stated that the only purpose of a card was to get an election. Taking Wright's testimony at face value, there would be no basis for invalidating his card because the asserted misrepresentation by Shinn did not occur until after Wright had signed the card and turned it in. Shinn testified credibly that he never stated to any employee that the sole purpose of a card was to obtain an election. I discredit so much of Wright's testimony which is to the contrary and will count Wright's card.

(4) *Summary*. In light of the foregoing findings, I further find that, by January 12, 1989, some 27 of the 47 members of Respondent's bargaining unit had signed valid authorization cards designating the Charging Party as their collective-bargaining representative for the purpose of negotiating a contract with the Respondent. Accordingly, the Union was the majority representative of the Respondent's production and maintenance employees on and after that date.

4. The refusal to bargain

On January 12, 1989, the Union wrote a certified letter to Rice in which it claimed to be the collective-bargaining representative of a majority of the Respondent's production and maintenance employees. It requested recognition following a card check. The Respondent never extended to the Union the courtesy of a formal reply, either orally or in writing. Instead it embarked upon a campaign of coercion and intimidation designed to destroy the Union's majority status by any means, either fair or foul. Accordingly, it is immaterial, in establishing a violation of Section 8(a)(5) of the Act, whether the Union possessed a card majority on that precise day so long as it did so either on January 12 or at some point in time thereafter, because the Union's demand for recognition is considered to be a continuing demand. *Jimmy Richard Co*., 210 NLRB 802 (1974); *Kena 60 Minute Photo*, 277 NLRB 867 (1985). As discussed more fully later on, in determining whether a bargaining order is an appropriate remedy, it is immaterial whether the Union ever made a demand for recognition, since a *Gissel* remedy, the principal bone of contention in this case, is a remedy for an 8(a)(1) violation and does not depend, for its validity, upon a preliminary finding that an employer has unlawfully refused to bargain. However, since the facts in the record herein make it abundantly clear that the Respondent did refuse to bargain collectively with the majority representative of its production and maintenance employees after being requested to do so, I find that it violated Section 8(a)(1) and (5) of the Act.

On the foregoing findings of fact and conclusions of law, and on the entire record herein considered as a whole, I make the following

CONCLUSIONS OF LAW

1. Custom Bent Glass Company, Custom Glass Corporation, Saxonburg Industries, and Custom Resources Company, is now, and at all times material have been, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Aluminum, Brick, and Glass Workers International Union, AFL–CIO–CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time production and maintenance employees employed by the Respondent at its Renfrew and Kittanning, Pennsylvania, factories, exclusive of office clerical employees, salesmen, guards, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. Since on or about January 12, 1989, the Union herein has been the exclusive collective-bargaining representative of all the employees in the unit found appropriate in Conclusion of Law 3 for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to recognize and bargain collectively with Aluminum, Brick, and Glass Workers International Union, AFL–CIO–CLC as the exclusive collective-bargaining representative of its employees employed in the unit found appropriate in Conclusion of Law 3, the Respondent has violated Section 8(a)(5) of the Act.

6. By discharging Steven Six, Gary Bowser, Virgil K. Cousins, and James A. Wright, by laying off John McKinney and then converting his layoff into a discharge, and by laying off John Baker and Charles Colton because of their membership in and activities on behalf of the Union, the Respondent herein violated Section 8(a)(3) of the Act.

7. By the acts and conduct set forth above in Conclusions of Law 5 and 6; by coercively interrogating employees concerning their union activities; by engaging in surveillance of the union activities of its employees and by creating in the minds of employees the impression that their union activities are the subject of company surveillance; by threatening to discharge employees and by telling employees that other employees have been discharged for engaging in union activities; by soliciting employees to withdraw their union authorization cards; by promising employees unspecified benefits if they would cease to support the Union; by telling employees that the Company would never recognize a union, would never bargain with a union, and would never sign a contract with a union; by telling employees that engaging in union activities would be futile because the company officers had bought off unions before and would buy them off again; by threatening to reduce production or to close the plant if the Union came in; by threatening to withhold pay increases and to cease investing in the Company if the Union came in; by advising an employee that his reinstatement was conditioned upon abandoning his support for the Union; and by promulgating and enforcing an overly broad no-solicitation rule, the Respondent herein violated Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent herein has engaged in certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. Since the independent violations of Section 8(a)(1) of the Act found herein are repeated, pervasive, and evidence an attitude on the part of the Respondent to behave in total disregard of its statutory obligations, I will recommend to the Board a so-called broad 8(a)(1) order designed to suppress any and all violations of that section of the Act. *Hickmott Foods, Inc*., 242 NLRB 1357 (1979). The recommended Order will also recommend that the Respondent be required to offer to Steven Six, John McKinney, John Baker, James A. Wright, Virgil K. Cousins, Gary Bowser, and Charles Colton full and immediate reinstatement to their former or substantially equivalent employment and to make them whole for any loss of earnings which they may have sustained by reason of the discriminations practiced against them, in accordance with the *Woolworth* formula,[32] with interest at the rate prescribed by the Tax Reform Act of 1986 for the overpayment and underpayment of income tax. *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The General Counsel and the Charging Party have requested, inter alia, a so-called *Gissel* remedy which would require the Respondent to recognize and bargain with the Union as the exclusive collective-bargaining representative of its production and maintenance employees. In this case the Respondent engaged in a campaign of wholesale intimidation and coercion of its employees upon learning that a union was undertaking an organizational campaign. Included in this effort was the layoff and discharge of seven suspected union adherents and threats to discharge more union supporters if and when they could be discovered. Also included in this effort were threats to either close the plant in the event of unionization or to reduce one of its main production lines so that large scale layoffs would be necessary. It is hard to imagine any conduct on the part of an employer which could more thoroughly decimate an organizing drive or more surely render a Board election meaningless. The Board and the Third Circuit have issued *Gissel* orders and decrees based upon conduct far milder than that which was found in this case. Accordingly, I have no hesitance about recommending it here. *NLRB v. S. E. Nichols-Dover, Inc*., 414 F.2d 561 (3d Cir. 1969); *NLRB v. Broad Street Hospital & Medical Center*, 452 F.2d 302 (3d Cir. 1971); *NLRB v. Easton Packing Co*., 437 F.2d 811 (3d Cir. 1971); *NLRB v. Colonial Knitting Corp*., 464 F.2d 949 (3d Cir. 1972); *Toltec Metals, Inc. v. NLRB*, 490 F.2d 1122 (3d Cir. 1974); *Frito-Lay v. NLRB*, 585 F.2d 62 (3d Cir. 1978); *NLRB v. Kenworth Trucks of Philadelphia*, 580 F.2d 55 (3d Cir. 1978); *NLRB v. Eagle Material Handling, Inc*., 558 F.2d 160 (3d Cir. 1977); *Midland-Ross Corp. v. NLRB*, 617 F.2d 977 (3d Cir. 1980). I will also recommend that the Respondent be required to post the usual notice, advising its employees of their rights and of the results in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[33]

ORDER

The Respondents, Custom Bent Glass Company, Custom Glass Corporation, Saxonburg Industries, and Custom Resources Company, Kittanning and Renfrew, Pennsylvania, and their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees concerning their union activities.

(b) Engaging in surveillance of the union activities of its employees and creating in the minds of employees the impression that their union activities are the subject of company surveillance.

(c) Threatening to discharge employees because of their union activities or telling employees that other employees have been discharged for engaging in union activities.

(d) Soliciting employees to withdraw their union authorization cards.

(e) Promising employees unspecified benefits if they cease supporting the Union.

(f) Telling employees that the Company will never recognize a union, will never bargain with a union, or will never sign a contract with a union.

(g) Telling employees that engaging in union activities will be futile because the company officers have bought off unions before and would buy them off again.

(h) Threatening to reduce production or to close the plant if a union comes in.

(i) Threatening to withhold pay increases or to cease investing in the Company if a union comes in.

(j) Advising employees that their reinstatement is conditioned on abandoning support for the Union.

(k) Promulgating or enforcing an overly broad no-solicitation rule.

(l) Discouraging membership in or activities on behalf of Aluminum, Brick, and Glass Workers International Union, AFL–CIO–CLC or any other labor organization by discharging or layoff off employees or otherwise discriminating against them in their hire or tenure.

(m) Refusing to recognize and bargain collectively in good faith with Aluminum, Brick, and Glass Workers International Union, AFL–CIO–CLC as the exclusive collective-bargaining representative of all of the Respondent's full-time and regular part-time production and maintenance employees employed at its Kittanning and Renfrew, Pennsylvania, plants, exclusive of office clerical employees, salesmen, guards, professional employees, and supervisors as defined in the Act.

(n) By any other means or in any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Steven Six, Gary Bowser, Virgil K. Cousins, James A. Wright, John McKinney, John Baker, and Charles Colton full and immediate reinstatement to their former or substantially equivalent employment, without prejudice to their seniority or to other rights previously enjoyed, and make them whole for any loss of pay or benefits suffered by them by reason of the discriminations found herein, in the

[32] *F. W. Woolworth Co*., 90 NLRB 289 (1950).

[33] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

manner described above in the remedy section of this decision.

(b) Recognize and, on request, bargain collectively in good faith with Aluminum, Brick and Glass Workers International Union, AFL–CIO–CLC as the exclusive collective-bargaining representative of all full-time and regular part-time production and maintenance employees employed by the Respondent at its Kittanning and Renfrew, Pennsylvania factories, exclusive of office clerical employees, salesmen, professional employees, guards, and supervisors as defined in the Act.

(c) Preserve and, on request, make available to the Board and its agents for examination and copying all payroll and other records necessary to analyze the amounts of backpay due under the terms of this Order.

(d) Post at the Respondent's Renfrew and Kittanning, Pennsylvania plants copies of the attached notice marked ''Appendix.''[34] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Insofar as the consolidated amended complaint in this case alleges matters which have not been found to be violations of the Act, the consolidated amended complaint is dismissed.

[34] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''